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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1946

No. 318

LOUISE McGREW MOFFETT AND LOUISE McGREW MOFFETT AS EXECUTRIX OF THE ESTATE OF THOMAS S. MOFFETT, DECEASED,

Appellants,

vs.

COMMERCE TRUST COMPANY, A CORPORATION, HELEN WEEDE, B. C. HOWARD AND WILLIAM H. KOPP,

Appellees

JURISDICTIONAL STATEMENT

The statutory provision believed to sustain the jurisdiction is Section 237(a), (b) and (c) of the Judicial Code as Amended (36 Stat. 1156, 43 Stat. 937, 45 Stat. 54, 28 U. S. C. 344(a), (b) and (c), 861(a) and 861(b).

The statutes of the State of Missouri the validity of which is involved include the Missouri Partnership Administration Statute, Article 3, Chapter 1, Revised Statutes of Missouri, 1939, Section 948 R. S., and Sections 2458, 2459, 2460 and 2461 R. S. Mo. 1939.

The statutes of the United States the validity of which is involved include Revised Statutes 1979, 1980 and 1981 (Sec-

tions 43, 47 and 48, Title 8, U. S. C.), and Section 8 of the Act of Congress of March 6, 1820 (3 U. S. Stat. 545, Chapter 22), admitting Missouri to the Union.

The judgment sought to be reviewed was rendered on February 11, 1946, and the Motion for Rehearing and to Transfer to Court *en banc*, duly filed, was overruled on April 8, 1946.

This appeal is allowed on this — day of June, 1946.

How Federal Questions Were Raised

The Federal Questions were raised in the pleadings at the outset, and continued in the case throughout. Said questions were preserved in the record proper and by exceptions in the Bill of Exceptions, Assignments of Error in the State Supreme Court, Motion for Rehearing and Transfer to the Supreme Court of Missouri, *en Banc*, and Assignments of Error in this Court.

As to Federal Questions resulting from rulings of the courts which appellants could not anticipate, such questions have been raised by Assignments of Error in the State Supreme Court, Motion for Rehearing and to Transfer to Court *en Banc*, and Assignments of Error in this Court.

The opinion of the Supreme Court of Missouri states (193 S. W. 2d, l. c. 590):

> "We will briefly set forth the general nature of the petition but deem it unnecessary to make a complete summary."

This necessitates a longer jurisdictional statement than ordinarily necessary.

(Figures in brackets refer to pages of the Record)

Mrs. Moffett began an action, in the circuit court of Jackson County, Missouri, on August 22, 1941, for damages

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based on property loss resulting from overt acts pursuant to a conspiracy violating her civil rights, by filing a 10 page petition and suing out process thereon. Appellees' attacks thereon resulted in the filing of a 39 page first amended petition (4-43) adding Mrs. Moffett as Executrix as a party plaintiff and two defendants, on which said petition six unsuccessful attacks, including the ground of misjoinder of parties plaintiff, were made (44-51) before assignment judge Buzard (47). A succeeding assignment judge erroneously made an order purporting generally to sustain three not legally pending demurrers and one non-pending demurrer to the same first amended petition (60-61). This caused the filing of a 73 page third amended petition (62-135) specifying the provisions of the United States Constitution, Laws and a Treaty on which the action was based. Another assignment judge erroneously made an order generally sustaining four pending demurrers to said pleading (152-153). This caused the filing of a 169 page (154-323) fifth amended petition, again specifying said provisions of the United States Constitution, Laws and Treaty. Thirty pages of exhibits were filed therewith (325-354). Another assignment judge, on the sole ground of misjoinder of parties plaintiff, erroneously sustained separate demurrers thereto, and made a finding "upon the record and from suggestions of counsel for said defendants now appearing, the court finds that a third petition of the plaintiffs has been found insufficient upon said ground" (401), and erroneously assigned said cause to his own division (424). Thereupon, without notice or hearing, said action was dismissed by the court and appellants' right to recover or to institute any further action forfeited, and a statutory penalty in favor of appellees adjudged against appellants, the entry reciting that three petitions had been found insufficient on demurrer (424-425) on the ground of misjoinder of parties plaintiff.

Appellants appealed on December 30, 1944, to the Supreme Court of Missouri. Division 1 of that court affirmed the judgment on February 11, 1946, and overruled a motion for rehearing or to transfer to Court *en banc* on April 8, 1946. In addition to affirming on the inadequate and untenable ground of misjoinder of parties plaintiff, the state supreme court held that, notwithstanding the law as to demurrers was repealed (Laws Missouri 1943, p. 361, Sec. 17), which repeal became effective four hours after the trial court rendered said judgment, the separate demurrers could have been sustained on the ground of misjoinder of causes of action (193 S. W. 2d, l. c. 591 (2, 3), specifying a libelous overt act, pursuant to the conspiracy, affecting appellants' federal rights (193 S. W. 2d, l. c. 590, bottom second column), as an independent cause of action (contrary to the decision in *Truax* v. *Corrigan*, 257 U. S. 312, l. c. 328, 329), and the ground that the petition failed to state a cause of action (193 S. W. 2d, l. s. 591 (2, 3), notwithstanding the law authorized recovery under the Federal Civil Rights Acts (R. S. 1979, 1980 and 1981).

All the Federal Questions involved were decided against appellants.

Said Division 1 of the Missouri Supreme Court is not the highest court in Missouri. Appellants sought by said motion to transfer the case to Court En Banc, which is the highest state court (*Gorman* v. *Washington University*, 316 U. S. 98; *Osment* v. *Pitcairn*, 317 U. S. 587). Division 1 did not apply the law as declared by the state Supreme Court En Banc, although bound so to do (*State ex rel.* v. *Reynolds*, 278 Mo. 554, l.c. 557-558; *State ex rel. Nevins* v. *Hughes*, 347 Mo. 968, l.c. 976), on many federal questions, including the question of the *res judicata* effect of its own judgment in the companion case of *In re Moffett Brothers Partnership Estate*, 345 Mo. 741, in violation of the XIVth Amendment.

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A copy of the opinion in said companion case is attached as Exhibit "B".

A copy of the opinion in this case is attached as Exhibit "A".

Among the overt acts committed by appellees were those resulting in a multitude of void court proceedings and fictitious suits for $2,539,366.80 (268), intentionally kept pending since 1930 for the purpose of injuring appellants by depriving them of the rights secured to them by the Acts of Congress known as the Civil Rights Acts, R. S. 1979, 1980 and 1981 (Sections 43, 47 and 48 Title 8 U. S. C.), Sections 51 and 52 Title 18 U. S. C., the XIIIth and XIVth Amendments to the Constitution, Section 10 of Article I of the Constitution prohibiting bills of pains and penalties, and Article III of the Treaty with France of April 30, 1803 (8 Stat. at L. 200, 202). The validity of Section 8 of the Act of Congress of March 6, 1820 (3 U. S. Stat. 545, Chap. 22), admitting Missouri to the Union and known as the Missouri Compromise, and of said Acts of Congress known as the Civil Rights Acts, is here involved.

Among the statutes of the State of Missouri the validity of which, on the ground of being repugnant to said provisions of the Constitution and Article III of said Treaty, is involved is the Missouri partnership administration statute (Art. III Chap. 1 R. S. Mo. 1939 (R. S. A.), and especially Sections 86, 87 and 88. Section 86, in substance, provides that, on failure of a surviving partner for 30 days after grant of letters testamentary on deceased partner's estate to file bond "the executor or administrator of the deceased partner shall give bond, in addition to the bond given by him as executor or administrator, in a sum at least double the value of the whole copartnership estate." Section 87 provides that every surviving partner, when such executor gives such bond, "shall surrender to him, on demand, all the property of such partnership, including

their books and papers, and all necessary documents pertaining to the same, and shall afford him all reasonable information and facilities for the execution of his trust." Section 88 provides that every surviving partner failing to comply with said sections may be cited therefor "before the proper court," and then provides "unless he comply with such provision, or show sufficient cause for his omission, the court may commit him to the common jail of the county, there to remain until he consent to comply, or is discharged by due course of law."

The validity of Section 948 R. S. Mo. is involved on the ground of repugnancy to the attainder provision of Section 10 of Article 1 and said provisions of the Constitution. It provides that when a third petition in a cause is adjudged insufficient on demurrer, that then "the party filing such pleading shall pay treble costs; and no further petition, answer or reply shall be filed, but judgment shall be rendered."

The validity of Sections 2458, 2459, 2460 and 2461 R. S. Mo. 1939 is involved on the ground of repugnancy to the "equal protection of the laws" provision of the Constitution. They purported to authorize the selection of a "Special judge of probate" by five attorneys, contrary to the provisions of Section 34 of Article VI of the state constitution vesting the judicial power in courts, including a probate court "in every county" which shall "consist of one judge, who shall be elected" by the people, and in case of a vacancy between elections the governor should fill the vacancy by appointment. The Missouri constitution contains no "equal protection of the laws" provision, and the validity of such statutes as applied, in denying appellants the protection of said state constitutional provisions was drawn in question by appellants because of conflict with the equal protection provision of the XIVth Amendment

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to the Federal Constitution (*Pierre* v. *Louisiana*, 306 U. S. 354; *Copperweld Steel Co.* v. *Industrial Commission of Ohio*, 324 U. S. 780-785; *Broad River P. Co.* v. *State ex rel. South Carolina*, 281 U. S. 537, l.c. 540).

The failure to give effect to the judgment of the United States Commissioner of Internal Revenue, whose judgment established that there was no basis for the judgment rendered by the district court of Harper County, Kansas, is here involved. (*United States* v. *Kaufman*, 96 U. S., l. c. 570-571; *M. K. & T.* v. *Elliott*, 184 U. S. 530). Said judgment is as binding as the judgment of a federal court, and such failure raises a Federal Question.

A. The Federal Questions Involved Herein Are Substantial

Questions involved in this case are *per se* and inherently federal. Appellees and others entered into an unlawful conspiracy to misuse the power of two states (285, 287) to deprive appellants of their rights secured to them by each and all of the aforementioned provisions of the United States Constitution, Laws and Treaty. Among the conspirators exercising such power was a Kansas state district judge (197, 208, 223-224) and Commerce Trust Company as purported Missouri executor of a deceased partner's estate, and purported Missouri administrators of partnership estates dissolved by the death of the deceased partner, the interests of which partnership estates were in conflict with the deceased partner's estate. Pursuant to said conspiracy appellees and others committed the overt acts alleged (195-198, 285-288, 223-224, 242-246).

The truth of the facts (154-353) was admitted by the demurrers (*Lawson* v. *Higgins*, 350 Mo. 1066). In *Truax* v. *Corrigan*, 257 U. S. 312, l. c. 324, it is said: "The facts alleged are admitted by the demurrer, and, in determining

their legal effect as a deprivation of plaintiff's legal rights under the 14th Amendment, we are at as full liberty to consider them as was the state supreme court."

In briefs (299-308) in support of their demurrers to the third amended petition, appellees stated: "The petition charges that by reason of false and perjured testimony and the corruption of the trial judge, plaintiff was deprived of her property in violation of Section 1 of the 14th Amendment to the Constitution of the United States. • • • The petition further alleges that by reason of the conspiracy and the corruption of the court, plaintiff was denied the rights secured to her by the Constitution of the United States 'and especially by the said provisions of the 14th Amendment to the Constitution of the United States, and by the provisions of Section 51 and 52 of Title 18 • • • and that said defendants, by reason of the injury thus caused plaintiff, became liable to said plaintiff under and by virtue of Section 43, Title 8.' " Said admission was of the same facts re-alleged in the fifth amended petition. The fifth amended petition, to which the last demurrers were directed, included an allegation setting forth the foregoing admission (299). Said admissions were overlooked by the state supreme court, when it held that a judgment so rendered did not deny appellants due process (193 S. W. 2d, l. c. 592, last 2 paragraphs).

In *In re Moffett Brothers Partnership Estate*, 345 Mo. l. c. 750, it was decided that Commerce Trust Company unlawfully prosecuted a claim as executor of the estate of the deceased partner John Moffett against itself as administrator of the partnership estate of Moffett Brothers before said Kansas judge. The opinion, discussing the acts of appellee Howard as claimant for a fee, declared that: "And notwithstanding that *the principal contention* in the partition-accounting suit was on the claim of the John

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Moffett estate against the Moffett Brothers estate, claimant admits that he represented both estates in that suit. And it appears that claimant, at the trial of the partition-accounting suit, presented the evidence that resulted in a judgment, against one of his clients, for $143,829.96. The picture can be better appreciated by visioning John and Thomas S. Moffett as living and adversaries in a lawsuit on the same claim of indebtedness, as here, and claimant representing both of them. In a supplemental brief on behalf of the Commerce Trust Company, filed by attorneys * * * There can be no question on the conflicting interests of the John Moffett estate and the Moffett Brothers estate in the partition-accounting suit." Said facts rendered said judgment void (*State ex rel. Miller's Admr.* v. *Bidlingmaier*, 26 Mo. l. c. 486; *State ex rel. Mueller's Admr.* v. *Reinhardt*, 31 Mo. 95).

The fifth amended petition also alleged that said Kansas judge intentionally made a false order of revivor (184-213), and in doing so acted in concert (223, 214) with said appellees, evidently laboring under the delusion that relief could not be had from a judgment so obtained (*Horner* v. *Shinstock*, 80 Kan. 136), wherein he appears to be counsel; and that said judge had actual knowledge of the falsity of Commerce Trust Company's Exhibit No. 8 offered in evidence on said trial by Commerce Trust Company through appellee Howard as its attorney for the John Moffett estate against Commerce Trust Company as administrator of Moffett Brothers partnership estate. The Missouri Supreme Court, in its opinion herein, erroneously held that such conduct constituted due process (193 S. W. 2d, l. c. 592).

This unanticipated error was called to the attention of the Supreme Court of Missouri at the first opportunity, in appellants' motion for rehearing.

As the action in the state court was based on appellants' right to recover on Sections 1979, 1980 and 1981 U. S. R. S. (Secs. 43, 47 and 48 Title 8 U. S. C.), supplementing the constitutional provisions and Treaty, the question presented to the state court was necessarily a question of federal law within the rule stated in *First National Bank* v. *Anderson*, 269 U. S. 341, l. c. 346: "Whether a pleading sets up a sufficient right of action or defense, grounded on the Constitution or a law of the United States, is necessarily a question of Federal law; and where a case coming from a state court presents that question, this court must determine for itself the sufficiency of the allegations displaying the right or defense, and is not concluded by the view taken of them by the state court. Mitchell *v.* Clark, 110 U. S. 633, 645, 28 L. ed. 279, 283, 4 Sup. Ct. Rep. 170, 312; Boyd *v.* Nebraska, 143 U. S. 135, 180, 36 L. ed. 103, 116, 12 Sup. Ct. Rep. 375; Covington & L. Turnp. Co. *v.* Sandford, 164 U. S. 578, 595, 41 L. ed. 560, 566, 17 Sup. Ct. Rep. 198; Carther *v.* Texas, 177 U. S. 442, 447, 44 L. ed. 839, 841, 20 Sup. Ct. Rep. 687. The principle is general, and is a necessary element of this court's power to review judgments of state courts in cases involving the application and enforcement of Federal laws. Davis *v.* Wechsler, 263 U. S. 22, 24, 68 L. ed. 143, 145, 44 Sup. Ct. Rep. 13. • • • In cases coming from state courts this court's power and concern are especially directed to rulings made or refused on Federal questions. Murdock *v.* Memphis, 20 Wall. 590, 638, 22 L. ed. 429, 445, Bi-Metallic Invest Co. *v.* State Bd., 239 U. S. 441, 444, 60 L. ed. 372 374, 36 Sup. Ct. Rep. 141. With the objections just considered out of the way, it suffices to say this court's jurisdiction on the writ of error has full support in Dahnke-Walker Mill Co. *v.* Bondurant, 257 U. S. 282, 66 L. ed. 239, 42 Sup. Ct. Rep. 106. The motion to dismiss is accordingly overruled"

Denial of the rights guaranteed by Section 1 of the XIVth Amendment and R. S. 1979, 1980 and 1981, same being Sections 43, 47 and 48 Title 8 U. S. C. (225, 287-288), authorized appellants to institute the action at law in the state court to recover damages for the resulting loss (*Wiley* v. *Sinkler*, 179 U. S. 58; *Swafford* v. *Templeton*, 185 U. S. 487). Appellants could recover such damages under the decisions of this and other courts. See *Picking et al.* v. *Pennsylvania Railroad Co. et al.*, 151. Fed. (2d) 240 (C. C. A. 3), which holds that a Railroad Company and other persons not state officers, by adopting and becoming parties to the conspiracy to which state officers, including a judicial officer, were parties, were liable to a husband and wife as plaintiffs in the same case for the loss resulting, under said Civil Rights Acts, from unlawful overt acts incident to suich conspiracy.

The Federal questions here presented, as to the right to recover damages for violation of constitutional rights, were decided in favor of appellants in *Bell et al.* v. *Hood et al.*, 90 L. ed. 758, 66 S. Ct. *773*, where it is said, l.c. 761-762: "The issue of law is whether federal courts can grant money recovery for damages said to have been suffered as a result of federal officers violating the Fourth and Fifth Amendments. That question has never been specifically decided by this Court. That the issue thus raised has sufficient merit to warrant exercise of federal jurisdiction for purposes of adjudicating it can be seen from the cases where this Court has sustained the jurisdiction of the district courts in suits brought to recover damages for depriving a citizen of the right to vote in violation of the Constitution. (Wiley *v.* Sinkler, 179 U. S. 58, 45 L. ed. 84, 21 S. Ct. 17 and Swafford *v.* Templeton, 185 U. S. 487, 46 L. ed. 1005, 22 S. Ct. 783. See also Brickhouse *v.* Brooks (CC) 165 Fed. 534, 543, in which a similar suit was held to be within the jurisdiction of the Federal court).

And it is established practice for this Court to sustain the jurisdiction of federal courts to issue injunctions to protect rights safe-guarded by the Constitution (Philadelphia Co. *v.* Stimson, 223 U. S. 605, 56 L. ed. 570, 32 S. Ct. 340. Hays *v.* Seattle, 251 U. S. 233, 64 L. ed. 243, 40 S. Ct. 125; Pennoyer *v.* McConnaughy, 140 U. S. 1, 35 L. ed. 363, 11 S. Ct. 699; City R. Co. *v.* Citizens' R. Co. 166 U. S. 557, 41 L. ed. 114, 17 S. Ct. 653; Mitchell *v.* Dakota Cent. Teleph. Co., 246 U. S. 396, 407, 62 L. ed. 793, 799, 38 S. Ct. 362) and to restrain individual state officers from doing what the 14th Amentment forbids the state to do. (Chicago, B. & Q. R. Co. *v.* Chicago, 166 U. S. 226, 41 L. ed. 979, 17 S. Ct. 581; see also *Ex parte* Virginia, 100 U. S. 339, 346, 347, 25 L. ed. 676, 679, 680). Moreover, where federally protected rights have been invaded, it has been the rule from the beginnig that courts will be alert to adjust their remedies so as to grant the necessarry relief (Marbury *v.* Madison, 1 Cranch (U. S.) 137, 162, 163, 2 L. ed. 60, 68, 69; Texas & N. O. R. Co. *v.* Brotherhood of R. & S. S. Clerks, 281 U. S. 548, 569, 570, 74 L. ed. 1034, 1045, 50 S. Ct. 427). And it is also well settled that where legal rights have been invaded, and a federal statute provides for a general right to sue for such invasion, federal courts may use any available remedy to make good the wrong done See e.g. Dooley *v.* United States, 182 U. S. 222, and cases cited and discussed at 228-230, 45 L. ed. 1074, 1080, 1081, 21 S. Ct. 762; Jackson County *v.* United States, 208 U. S. 343, 349, 350, 84 L. ed. 313, 316, 317, 60 S. Ct. 285). Whether the petitioners are entitled to recover depends upon an interpretation of 28 U. S. C. A. Sec. 41 (1), 7 F. C. A. title 28, Sec. 41 (1) and on a determination of the scope of the Fourth and Fifth Amendments' protection from unreasonable searches and deprivations of liberty without due process of law. Thus, the right of the petitioners to recover under their complaint will be sustained if the Constitution and laws of the United

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States are given one construction and will be defeated if they are given another. For this reason the district court has jurisdiction."

There this Court thus gave effect to the same principle applied in *Weeks* v. *United States*, 232 U. S. 383, where it was held that if the Government could be permitted to take advantage of its own violation of the XIVth Amendment to the Constitution, that the constitutional command "is of no value, and, so far as those thus placed are concerned, might as well be stricken from the Constitution." (1. c. 393) And so, if the admitted violations of the XIVth Amendment could be held not to authorize recovery herein, then the prohibitions thereof to the states as to privileges and immunities, due process and equal protection of the laws, are also of no value and might as well be stricken from the Constitution. The admitted acts of appellees, pursuant to the unlawful conspiracy, in violation of rights secured by the Federal Constitution "should find no sanction in the judgments of the courts, which are charged at all times with support of the Constitution, and to which people of all conditions have a right to appeal for the maintenance of such fundamental rights." (*Ibid.* 1. c. 392).

Said rights are not merely rights created by state laws protected by the Federal Constitution, though the petition does assert some rights of that character. The rights created by said Civil Rights Acts and by the Constitution and Treaty are enforceable in the state courts, for "The laws of the United States are laws of the several states, and just as much binding on the citizens and courts thereof as the state laws are. * * Legal or equitable rights, acquired under either system of laws, may be enforced in any court of either sovereignty competent to hear and determine such kind of rights and not restrained by its Constitution in the exercise of such jurisdiction." (*Claflin* v. *Houseman*, 93 U. S. 1. c. 136). The Missouri

court in *Wells* v. *Davis*. 303 Mo. 388, quoted the above with approval, and also quoted and applied the Federal law, as applied by a Pennsylvania court where it said of a Federal statute creating a right or cause of action:" • since the Supreme Court of the United States has decided that this statute must be treated by state courts, in each instance, as though an act of their own legislature, for all practical purposes it is a Pennsylvania statute." (1. c. 403). The court then pointed out that the fact that the Pennsylvania state statutes purporting to deal with such Federal questions, both as to rights *and remedies*, had no application, saying: "As to this class of persons it *pro tanto* repealed the State Statutes. Such State statutes became as ineffective, both as to rights and *remedies*, as they would have been had they been specifically repealed by the State." (1. c. 404-405).

This Court in *Wiley* v. *Sinkler*, 179 U. S. 58, and *Swafford* v. *Templeton*, 185 U. S. 487, l.c. 492, has held that as to rights of action for damages caused by violation of rights created by the Civil War Amendments, the State and Federal courts have concurrent jurisdiction, and both were approved in *Bell et al.* v. *Hood et al., supra.* In *Swafford* v. *Templeton, supra,* this Court pointed out the jurisdictional distinction between "controversies concerning rights which are created by the Constitution or laws of the United States, and which consequently are in their essence Federal, and controversies concerning rights not conferred by the Constitution or laws of the United States, the contention respecting which may or may not involve a Federal question depending upon what is the real issue to be decided or the substantiality of the averments as to the existence of the rights which it is claimed are Federal in character." (l.c. 494.)

This consideration as to the questions here involved brings this case within the class of controversies concern-

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ing rights created by the Constitution and laws of the United States, rather than those not created by the Constitution or laws of the United States but which may or may not involve a Federal question, as outlined in *Swafford* v. *Templeton, supra.*

Federal questions which are *per se* and inherently Federal are questions, with reference to Federal jurisdiction, which are always "substantial" in a State or Federal court. *Equitable Life Assur. Soc.* v. *Brown*, 187 U. S. 308, involved a review of a judgment of the Territorial Court of Hawaii. An Act of Congress gave this Court the same jurisdiction to review that territorial court judgment as it is given to review the State judgment herein by Section 344, Title 28 U. S. C. There this Court stated the rule which applies in this case, thus, l.c. 311: "The power, however, to dismiss, because of the want of substantiality in the claim upon which the assertion of jurisdiction is predicated, does not apply to cases where the subject matter of the controversy is *per se* and inherently Federal. Swafford *v.* Templeton, 185 U. S. 487, 493."

That principle was applied in *Bell et al.* v. *Hood et al.*, 90 L. Ed. 758, following and applying *Swafford* v. *Templeton, supra,* holding that because of the violation of the guaranties of the Fourth and Fifth Amendments by Government officers breaking into plaintiff's home and depriving them of their liberty and subjecting them to unlawful arrest and unreasonable search and seizures in violation of the Constitution, constituted a Federal question giving the Court jurisdiction.

In *Picking et al.* v. *Pennsylvania R. Co. et al.*, 151 F. (2d) 240 (C. C. A. 3), the same principle was applied in holding that State officers and others who, pursuant to a conspiracy, misused the power of the two States to the injury of plaintiffs there, were liable under R. S. 1979, Sec. 43, Title 8

U. S. C. And, following the principle outlined in *Culp* v. *United States*, 131 F. (2d) 93, cited in a concurring opinion in *Screws* v. *United States*, 325 U. S. 91, the Court of Appeals held that the trial court erred in holding that the "inept" pleading there involved did not state a cause of action, and on the contrary decided that the Constitution and the Civil Rights Acts *created a cause of action* for deprivation of constitutional rights which the court was bound to enforce.

In *Neal* v. *Delaware*, 103 U. S. 307, this Court held that if a state court deprived any person within its jurisdiction of his civil rights that the error will be corrected in a superior court of the State, and if not "ultimately in this Court on review."

In *Kentucky* v. *Powers*, 201 U. S. 1, l.c. 31, it was decided that this Court had jurisdiction, on appellate review, to protect any right granted or secured by the Constitution or Laws of the United States, and denied by a state court.

R. S. 1979 has on many occasions been held valid by the courts. (*Smith* v. *Allwright*, 321 U. S. 649; *Nixon* v. *Herndon*, 273 U. S. 536; *Nixon* v. *Condon*, 286 U. S. 73; *Lane* v. *Wilson*, 307 U. S. 268; *Guinn* v. *United States*, 238 U. S. 347; *Brickhouse* v. *Brooks*, 165 Fed. 534 (cited with approval in *Bell et al.* v. *Hood et al.*); *Myers* v. *Anderson*, 238 U. S. 368; *West* v. *Bliley et al.*, 33 F. (2d) 177, 42 F. (2d) 103; *Anderson* v. *Meyers*, 182 Fed. 223, l.c. 227; *Wayne* v. *Venable*, 260 Fed. 64; *Wadleigh* v. *Newall*, 136 Fed. 941.)

The demurrers admitting the facts which authorized appellants to recover under the Civil Rights Acts, R. S. 1979, 1980 and 1981 (Secs. 43, 47 and 48 Title 8 U. S. C.), questioned the validity of said Acts of Congress by claiming that appellants were not entitled to recover under said statutes. The Missouri court, by sustaining said demurrers, has held said Acts of Congress invalid. (*United States* v. *Sutton*, 215 U. S. 291, l.c. 294).

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Plaintiff, in two capacities, was held by this Court to be entitled to recover damages for violation of the constitutional rights involved in that case (*Bell et al.* v. *Hood et al.*, 90 Law Ed. 758). And so appellant herein, in two capacities, is entitled to recover, since it is alleged and admitted that appellants' federal rights were violated, to her damage, in both capacities.

This Court, even in an original proceeding, recently permitted the same person to sue in the same case in an individual and representative capacity (*Georgia* v. *Pennsylvania R. Co. et al.*, 324 U. S. 439, 89 L. Ed. 1051). There is no legal reason to prevent appellants herein from enforcing federal rights in the state court in such capacities.

In *Picking et al.* v. *Pennsylvania R. Co. et al.*, 151 Fed. (2d) 240 (C. C. A. 3) the Court of Appeals held that a husband and wife, as joint plaintiffs, were entitled to recover, in a case on all fours with that at bar, for violation of the rights secured by the Constitution and the same Civil Rights Acts. Furthermore, the statutes of the State of Missouri, Sections 856, 857 and 858 R. S. Mo. 1939 (R. S. A.) authorized the maintenance of actions in the courts of that State by any person or persons who could maintain the same in the federal courts (*Shaw* v. *Railroad*, 314 Mo. 123, l.c. 130; *Bright* v. *Wheelock*, 323 Mo. 840; *Wells* v. *Davis*, 303 Mo. 388; and Kansas courts: *Hotchkiss* v. *Ogle*, 153 Kan. 156, l.c. 162; *Ravenscraft* v. *Pratt*, 22 Kn. 20, 167. The denial of that right to appellant here by the supreme court of the state denied the rights secured by the XIVth Amendment (*Lawrence* v. *State Tax Coms'n.*, 286 U. S. 276).

In *Art Metal Works* v. *Abraham and Strauss*, 70 Fed. (2d) 639, the opinion of a three judge court was written by a judge later convicted of corruption (*United States* v. *Manton*, 107 Fed. (2d) 834). The same court, five years after, set aside said judgment (*Art Metal Works* v. *Abra-*

ham and Strauss, 107 Fed. 940, 944). This Court denied certiorari to review the later judgment setting aside the former (308 U. S. 621). It declined to review the original judgment on certiorari (293 U. S. 596). Since passage of a term deprived a federal court of power to set aside its own judgment (*United States* v. *Mayer,* 235 U. S. 55), then the judgment setting aside could only have been based on the ground that such disqualification of a judge rendered any judgment of the court in which he sat void. The case setting aside (107 Fed. (2d) 940, 944) the first judgment on said ground is cited with approval in *Hazel-Atlas Glass Co.* v. *Hartford Empire Co.,* 322 U. S. 238, l.c. 245. The heart of the opinion in *Hazel-Atlas Glass* case is quoted and applied by the Missouri court in *Sutter* v. *Easterly,* 189 S. W. (2d) 284, l.c. 287-288. There, as here, an attorney conspired to obtain a judgment by fabricated evidence. His client was not a party thereto. Said court said: "The facts in the Hazel-Atlas case show more extensive fraud and one in which the client participated" (l.c. 288, column 2), as here. The supreme court of Missouri denied appellants herein the benefit of the principle it applied in that decision. In *Leichty* v. *Kansas City Bridge Co.,* 190 S. W. 2d 201, the Missouri Supreme Court en Banc held that fraud upon the court and violation of the requirement of due process rendered a Kansas judgment void, and authorized recovery for damages, regardless of the void judgment. The failure of the Missouri court to give appellants the equal protection of the laws, so declared by itself, denied to appellants each and all of the rights secured by the XIVth Amendment to the Federal Constitution, which said court did by deciding that appellants were not denied due process, and that the petition did not state a cause of action, in connection with the other questions involved.

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The court erred in affirming the judgment because based on the finding: "And upon the record and from suggestions of counsel for said defendants now appearing, the court finds that a third petition of the plaintiffs has been found insufficient upon said ground and that the said defendants are entitled to have plaintiffs' action dismissed as to them and to recover treble costs within and pursuant to the provisions of Section 948, Revised Statutes of Missouri, 1939."

Said finding was based in part upon the "suggestions of counsel for said defendants" (424). This was error violating appellants' rights under the XIVth Amendment under the decisions in *Ensminger* v. *Powers*, 108 U. S., l.c. 298-302, and *Kelley* v. *Town of Milan*, 221 Fed. 842. Mr. Justice Matthews, sitting on circuit in *Kelley* v. *Town of Milan*, concurred in the following statement: "And in *Ensminger* v. *Powers*, 108 U. S. 292, S. C. 2 Sup. Ct. Rep. 643, a very remarkable case, the court denied effect to a plea of *res judicata* on a bill of review, because the decree pleaded was not the 'deliberate judgment of the court upon the facts in the record,' and 'the functions of the judge were abdicated,' etc. It is a very instructive case." (l.c. 869).

The record shows that said finding was the basis of the final judgment dismissing the case on the merits and assessing a penalty. The record also shows that said finding based on the "suggestions of counsel for said defendants now appearing" was made after a denial of appellants' request to be heard (421). The record shows the following entry before the judgment entry: "And at the same time, and as a part of the same proceeding and order sustaining said alleged demurrers, said Circuit Court, without any evidence having been offered to sustain same, and without notice thereof or hearing or jurisdiction so to do, made and entered the following order and judgment

in said court and cause:" (406). The record shows that said finding was incorrect because the record discloses that one non-pending demurrer and three not lawfully pending demurrers were sustained to the first amended petition. It also shows that the appellees admit that the decisions as to demurrers sustained to the third amended petition were based on untrue statements contained in appellees' briefs that the allegations in the amended petition were false, notwithstanding their demurrers admitted their truth. (306-307).

The fact that Judge Ridge placed the recital in the record showing that his decision was in part based on the suggestions of counsel for appellees, together with the fact that some months afterward, over the objection of the appellees, he allowed a bill of exceptions, indicates that he desired to have the record show the basis of his rulings, as did the judge in *Ensminger* v. *Powers,* 108 U. S. 292, where it is said l.c. 301: "It is quite apparent that the judge intended that what occurred should be spread before this court on appeal, so that its effect on the validity of the decree might be considered."

B. The Missouri Partnership Administration Statute Conflicts With the XIIIth and XIVth Amendments and Treaty With France of April 30, 1803.

The validity of the Missouri partnership administration statute (Article 3, Chap. I, R. S. Mo. 1939), and particularly Sections 86, 87 and 88 thereof, was drawn in question (288-291) by appellants because of conflict with the XIIIth and Section 1 of the XIVth Amendments, the attainder prohibition of Section 10 of Article 1, and Article III of the Treaty with France of April 30, 1803 (290) (8 Stat. at L. 200-202). It was alleged and admitted that said statutes were enacted by the Missouri legislature in the year 1845 (288) (R. S. A.),

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pursuant to authority given to Missouri by the void Section 8 of the Act of Congress of March 6, 1820 (290) admitting Missouri to the Union and known as the Missouri Compromise (288-291). The validity of said Section 8 was drawn in question by reason of its conflict with the XIIIth and XIVth Amendments in authorizing involuntary servitude in Missouri.

Though held invalid in *Scott* v. *Sandford*, 19 How. 393, as to territory north of Missouri, the compromise as to Missouri was held valid in that case by this Court, and by the state court in this case, though void. Even had it been valid before, said Amendments made it void (*Kaugauna Water Power Co.* v. *Green Bay, etc. Co.*, 142 U. S. 254).

The Federal question arising out of the decision necessarily involved therein is therefore *per se* and inherently federal. (*State ex rel.* v. *Smith*, 177 Mo. 69, l. c. 94-95, citing *Kaugauna Co.* v. *Green Bay, etc., Co.*, 142 U. S. 254; *Wilson* v. *Black Bird Creek Marsh Co.*, 27 U. S. (2 Pet.) 245; *Armstrong* v. *Athens County*, 41 U. S. (16 Pet.) 281; *Chicago L. Ins. Co.* v. *Needles*, 113 U. S. 574; *Eureka Lake and Y. Canal Co.* v. *Yuba County Super. Ct.*, 116 U. S. 410."

In *New Orleans* v. *De Armas*, 9 Pet. 224, this Court held it was without jurisdiction unless the right asserted "is protected by the Treaty ceding Louisiana to the United States or by some Act of Congress." It held that if any rights secured by the Treaty were violated that "the individual supposing himself to be injured, might have brought his case into this court, under the twenty-fifth section of the Judicial Act" (l. c. 234-235). And further, "where an act of Congress attempted to divest a title which was vested under the pre-existing government"—that is, vested under the Treaty—this Court would have jurisdiction. The act of admission of a state was held, in *New Orleans* v. *De Armas, supra,* to render the Treaty obsolete. But, being

void as to Missouri, the act of admission did not have that effect. The Treaty securing the protection of the Fifth Amendment to the inhabitants of Louisiana Territories remained in force after admission. Article III had the same effect as a similar provision in the Treaty with Russia (*Rassmussen* v. *United States*, 197 U. S. 516).

To hold otherwise as to these partnership statutes enacted in the year 1845 would be a construction not unlike the construction put upon a treaty referred to by Puffendorf, b. 5 c. 12, between two nations in which one stipulated to restore to the other one-half of the ships which they had taken, and then, after entering into the treaty, performed it by sawing the whole of them in two, by which they rendered the treaty wholly useless—a construction which Puffendorf reprobates with great severity.

However, the validity of said partnership administration statute and of said Act of Congress was specifically drawn in question in appellants' pleading (288-291, 156). And so the inherent nature of said federal question, in and of itself, supplemented by the way in which it was questioned by appellant, and decided by the State court, brings this case strictly within the obligatory appellate jurisdiction of this Court (*Whitfield* v. *Ohio*, 297 U. S. 431).

Section 87 of said partnership administration statute directed that on demand Thomas S. Moffett as surviving partner must surrender his own property to the administrator of the deceased partner. It also commanded him to give all reasonable information and reasonable facilities for the execution of his trust to said representative. Since said section compelled all survivors to surrender their own property on pain of being sent to jail, as provided in Section 88, without a judicial trial, the statute was void under the due process provision of the XIVth Amendment. It was also void because of the indefinite character of the

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information and facilities which he was compelled to give to said representative, on pain of being sent to jail (*United States* v. *Cohen Grocery Co.*, 255 U. S. 81, l. c. 89, 91). Said decision is cited with approval in *Screws* v. *United States*, 325 U. S. 91. See also *Connally* v. *General Construction Co.*, 269 U. S. 385, 391, approved in *Star Square Auto Supply Co.* v. *Gerk*, 325 Mo. 968, 996; *Cline* v. *Frink Dairy Co.*, 274 U. S. 445; *Collins* v. *Kentucky*, 234 U. S. 634; *International Harvester Co.* v. *Kentucky*, 234 U. S. 216; *In re Thompson*, 117 Mo. 83, 89, 90, Court *In Banc.*

Compelling the survivor to give "reasonable information" and "reasonable facilities," to Commerce Trust Company on its demand (in this concrete instance involving assets of one partnership admitted by appellants to be worth $650,000.00 (289), and which assets were in several states), condemned the surviving partner, Thomas S. Moffett, to involuntary servitude (*Ex parte Drayton et al.*, 153 Fed. 986; *Bailey* v. *Alabama*, 219 U. S. 219; *Taylor* v. *Georgia*, 315 U. S. 25, 31; *Slaughter House* Cases, 16 Wall. 36), in violation of the XIIIth Amendment.

The validity of the Missouri statute, Section 948 R. S. Mo. 1939, was drawn in question on the ground of conflict between said statute and the provision that "No State shall • • • pass any bill of attainder" (Art. I, Sec. 10 of the Constitution). Said statute, as applied herein by the trial court, was void because contrary to the law of the State and Nation, in that the trial court, without a hearing, and by denying appellants' request for a hearing (421) required by the rules (402-406), was binding on the court (*Meierhoffer* v. *Hansell*, 294 Mo. 195). That judgment (424-425) forfeited appellants' right to maintain the action or to institute another, and, with its assessment of a penalty, made said statute a mere legislative decree and a true bill of pains and penalties. It forfeited appellants' fundamental right

to maintain the suit for the loss caused by the deprivation of the rights secured by the provisions of Section 1 of the XIVth Amendment. *Cummings* v. *Missouri*, 4 Wall. 277; Cooley on Principles of Constitutionl Law, pages 311-312 says: "And a case in which the punishment is imposed indirectly, as by depriving one of the right to follow his occupation, *or to institute suits*, • • • is as much a bill of attainder as is an act directly imposing a punishment." In *Chambers* v. *Railroad Co.*, 207 U. S. 142, l. c. 148, it is said: "The right to sue and defend in the courts is the alternative of force. In an organized society it is the right conservative of all other rights, and lies at the foundation of orderly government. It is one of the highest and most essential privileges of citizenship."

In *State* v. *Powers*, 17 Atl. 969, 51 N. J. L. 432, 14 Am. St. Rep. 693, the court said: "Among civil rights is the right to prosecute and defend actions in the courts of the Commonwealth according to the established rules of practice. This proposition is sufficiently vindicated by a reference to the civil rights cases in the Supreme Court of the United States (100 U. S.) where it is assumed by all the justices of that tribunal."

In *Bell et al.* v. *Hood et al.*, 66 Sup. Ct. 773, it is said: "The party who brings a suit is master to decide what law he will rely upon" (l. c. 775).

These considerations make said question an inherently substantial federal question.

The jurisdiction of the court to apply Section 948 was conditioned upon the statutory provision that three petitions had been rightfully held insufficient on demurrer. Three petitions had not been lawfully held insufficient on demurrer. The first amended petition was held insufficient, on one non-pending demurrer and three demurrers unlawfully filed, by Judge Terte after it had been held sufficient

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by Judge Buzard's orders, and while Judge Buzard's orders sustaining it remained unchanged. The opinion herein attempted to justify Judge Terte's orders (193 S. W. (2d) l. c. 591-592) by stating that his rulings were on an amended petition different from that which had been ruled upon by Judge Buzard. Even the opinion itself correctly shows that there was no basis for that attempted justification, as it declares (193 S. W. (2d) l. c. 589, 3d Par.), before reaching the attempted justification part, that the pleading as to which Judge Buzard overruled demurrers and Judge Terte sustained demurrers was the same. This earlier statement in the opinion is sustained by the record (47, 60-61), and the attempted justification part is contradicted. Judge Ridge applied Section 948 when three petitions had not lawfully been adjudged insufficient on demurrers of appellees. It cannot lawfully be held that because a petition was held insufficient on a non-pending demurrer that it was held insufficient on a pending demurrer.

It was the duty of Judge Ridge, when he undertook to render the judgment disposing of the case, to examine the rulings of the preceding assignment judges in the case, including his own as such, and correct the error on which the rulings were based, and grant a hearing as to such questions to appellants (*Kinsella* v. *Kinsella*, 353 Mo. 661, l. c. 669 (4). It was also his duty, before sustaining the last demurrers and before rendering any judgment, to accord to appellants the hearing required by the rule 29 (402-403) as to the part consisting of demurrers, and statute (Sec. 965, R. S. Mo. 1939) as to the parts of the pleadings consisting of motions (*Meierhoffer* v. *Hansel*, 294 Mo. 195). The fact that he failed to do so, according to the definition of a bill of attainder given in the opinion herein (193 S. W. 2d, l. c. 592 (10)), made the statute, as construed and applied herein, a mere legislative decree or bill of pains and penalties.

See statement of Mr. Justice Matthews in *Hurtado* v. *People of California*, 110 U. S. l. c. 535-536.

Appellants' rights to the protection of the law of the State of Missouri, under the XIVth Amendment, were denied to them. "The Fourteenth Amendment applies to the common law policy as well as the statutory policy of a State." (*Barber* v. *Time, Inc.*, 348 Mo. l. c. 1203; *Federation of Labor* v. *Swing*, 312 U. S. 321). But the common law of Missouri is statutory law (Section 645, 646 R. S. Mo. 1939; *Tennessee Coal & Iron Co.* v. *George*, 233 U. S. 354). The force of the Act of Congress of June 4, 1812, adopting the common law in Missouri is not yet spent (*Davis* v. *McColl*, 179 Mo. App. l. c. 204-205). According to that common law, liability for damages resulting from overt acts incidental to an unlawful conspiracy is authorized in Missouri (*Kansas City* v. *Rathford*, 353 Mo. 1130; *Ruckels* v. *Pryor*, 351 Mo. 819, l. c. 846, quoting the *Teapot Dome* case by this Court).

The conspiracy herein involved is treated as an independent tort in Missouri. The participants in the conspiracy, by force of numbers and by reason of the fact that they included powerful politicians backed by great financial resources, possessed that peculiar power of coercion and injury which an ordinary individual standing in a similar relation to the victim does not have. *Shaltupsky* v. *Brown Shoe Co.*, 350 Mo. 835, recognizes the existence of conspiracy in Missouri as an independent tort, adopting the description of that variety of conspiracy described in 15 C. J. S., p. 1002, Sec. 8. *Baucke* v. *Adams*, 188 S. W. (2d) l. c. 366 refers to that brand of conspiracy.

The most ancient statute with reference to such conspiracies has been incorporated into the law of Missouri (*State* v. *Dalton*, 134 Mo. App. l. c. 528-529). That statute is 33 Edward I. It describes appellees herein: "Con-

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spirators be they that do confederate or bind themselves by oath, covenant or other alliance, that every of them shall aid and bear the other * * * falsely to move and maintain pleas." The phrase "falsely to move or maintain pleas" includes fictitious civil actions (*State* v. *Bacon*, 61 Atl. 653). At common law "falsely to move or maintain pleas" subjected the conspirators to the liability outlined in Coke's Institutes Part III, p. 222, thus: "But in a writ of conspiracy at the suit of the party grieved, the judgment is, damages to the party, fine to the King and imprisonment."

That common law, both as to damages, fine and imprisonment, has long been the law of Missouri. See foregoing decisions and Section 4632 R. S. Mo. 1939, making it a misdemeanor for conspirators falsely "to move and maintain any suit," or "to commit any act * * * for the perversion or obstruction of justice, or the due administration of the laws." Said statute has been in force since A. D. 1825 (Mo. R. S. A.). *Aikens* v. *Wisconsin*, 195 U. S. 194, declares: "* * * the intentional infliction of temporal damages is a cause of action, which, as a matter of substantive law * * * requires a justification if the defendant is to escape * * * (l. c. 204). "The most innocent and constitutionally protected of acts or omissions may be made a step in a criminal plot, and if it is a step in a plot, neither its innocence nor the Constitution is sufficient to prevent the punishment of the plot by law" (l. c. 206). There *Quinn* v. *Leatham*, A. C. 495, is thrice cited. There it is said: "Essential elements, whether of a criminal or of an actionable conspiracy, are, in my opinion the same * * * The number and the compact give weight and cause danger * * * It is true these words were uttered touching a criminal case, but they are none the less applicable to conspiracies made the subject of civil actions like the present * * * A number of acts and none in themselves not actionable or unlaw-

ful if done separately without conspiracy may, with conspiracy, become dangerous and alarming, just as a grain of gun-powder is harmless but a pound may be highly destructive, or the administration of one grain of a particular drug may be most beneficial as a medicine, but administered frequently and in large quantities with a view to harm may be fatal as a poison."

And so the intentional administration of the over-doses of legal and illegal medicine to appellants in this case were highly destructive, and the large quantities thereof, with a view to harm, were fatal to appellants' federal rights.

Chancellor Halsbury, discussing the same question in the same case, said that "Some men are a host in their individual selves: are lions; some multitudes are asses: e. g. Napoleon; Bismark: and the Nations whom they crushed." That statement illustrates the extraordinary power of these appellees in Missouri and Kansas.

The law applied in *Mogul Steamship Co.* v. *McGregor*, A. C. (1892), p. 25, has been adopted into the law of Missouri by the opinion in *Heim* v. *Belinder*, 97 Mo. App. l. c. 72. So that the action formerly referred to as a writ of conspiracy is regarded in Missouri as an independent tort, by means of which appellants were deprived of the foregoing federal rights.

C. The Judgment of the State Court Is Not Based on Non-Federal Ground

The judgment of the Missouri Supreme Court is not based upon an independent non-federal ground adequate to support it.

In *State ex Rel. Ry. Co.* v. *Hall*, 337 Mo. 1229, l. c. 1233, the Missouri Supreme Court well said: "Furthermore, we are bound by the rulings of the Supreme Court of the United States, which deny the right to apply a local rule of practice

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so as to defeat the plain assertion of a Federal right, such as in the case at bar, which is secured under the Constitution. Illustrative of that doctrine is Davis, Director General, *v.* Wechsler, 263 U. S. 22, which was a proceeding by certiorari to the Kansas City Court of Appeals, wherein it was held: 'The state courts may deal with that (a rule of practice) as they think proper in local matters but they cannot treat it as defeating a plain assertion of Federal right. . . . If the Constitution and laws of the United States are to be enforced, this court cannot accept as final the decision of the State tribunal as to what are the facts alleged to give rise or to bar the assertion of it even upon local grounds. (Creswill *v.* Grand Lodge Knights of Pythias, 225 U. S. 246). This is familiar as to the substantive law and for the same reason it is necessary to see that local practice shall not be allowed to put unreasonable obstacles in the way. See American Ry. Express Co. *v.* Levee, decided this day, ante, 19.' (See also Michigan Central Railroad Co. *v.* Mix, 78 U. S. 492, 73 L. Ed. 470.)"

In *Kalb* v. *Feuerstein*, 308 U. S. 433, at l. c. 439 this Court said: "The States cannot, in the exercise of control over local laws and practice, vest State courts with power to violate the supreme law of the land." In *United States* v. *Pink*, 315 U. S. 203, at l. c. 238 this Court said: "When the decision of a question of fact or of local law is so interwoven with the decision of a question of national authority that the one necessarily involves the other, we are not foreclosed by the state court's determination of the facts or of the local law. Otherwise national authority could be frustrated by local rulings. See Creswill *v.* Grand Lodge, K. of P., 225 US 246, 56 L ed 1074, 32 S Ct 882; Davis *v.* Wechsler, 263 US 22, 68 L ed 143, 44 S Ct 13." In *Jackson County* v. *United States*, 308 U. S. 343, l. c. 350, this Court said: "Nothing that the state can do will be allowed to destroy the federal right which is to be vindicated."

The statute of Kansas, Section 22-1308 R. S. Kan. 1923 (250), alleged in the petition, as construed by the state court with reference to the Kansas judgments which the state court held valid, brings this case, on the question of jurisdiction, within the principles stated by this Court in *Adam* v. *Saenger*, 303 U. S. l. c. 64, where this Court said that "• • • since the existence of the federal rights turns on the meaning and effect of the California statute, the decision of the Texas court on that point, whether of law or of fact, is reviewable here." In *Lovell* v. *Griffin*, 303 U. S. l. c. 450, one of the questions for determination was whether or not a federal question was adequately presented to and was decided by the state court. Chief Justice Hughes said: "Whether it was so presented and was decided is itself a Federal question. Carter *v.* Texas, 177 U. S. 442, 447, 44 L. Ed. 839, 841, 20 S. Ct. 687; Ward *v.* Love County, 253 U. S. 17, 22, 64 L. Ed. 754, 758, 40 S. Ct. 419; First Nat. Bank *v.* Anderson, 269 U. S. 341, 346, 70 L. Ed. 295, 302 46 S. Ct. 135; Schuylkill Trust Co. *v.* Pennsylvania, 296 U. S. 113, 121, 80 L. Ed. 91, 97, 56 S. Ct. 31. This Court has jurisdiction." (*Norris* v. *Alabama*, 294 U. S. l. c. 590; *Paterson* v. *Alabama*, 294 U. S. 600). In *Patterson* v. *Alabama*, l. c. 607, this Court said: "The Court is bound to consider any change, either in fact or in law, which has supervened since the judgment was entered." In *Abie State Bank* v. *Bryan*, 282 U. S. 765, at l. c. 773 this Court said: " 'But where the non-federal ground is so interwoven with the other as not to be an independent matter, or is not of sufficient breadth to sustain the judgment without any decision of the other, our jurisdiction is plain.' See Creswill *v.* Grand Lodge, K. P. 225 U. S. 246, 261, 56 L. Ed. 1074, 1080, 32 S. Ct. 822."

In *Broad River P. Co.* v. *State ex rel. South Carolina*, 281 U. S. 537, at l. c. 540 this Court announced the rule which

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applies to the claim that the state court denied appellants the protection of the Constitution of Missouri, Section 34, Article VI, against the void statutes providing for "Special judges" in that state. The denial of that protection as against said statute necessitates the assumption of jurisdiction by this Court under the following statement of the law: "Whether the state court has denied to rights asserted under local law the protection which the Constitution guarantees is a question upon which the petitioners are entitled to invoke the judgment of this Court. Even though the constitutional protection invoked be denied on non-federal grounds, it is the province of this Court to inquire whether the decision of the state court rests upon a fair or substantial basis. If unsubstantial, constitutional obligations may not be thus evaded." This also applies to the denial of the protection of the common law of Missouri and of Sections 4632 *et seq.*

Fox River Paper Co. v. *Railroad Commission*, 274 U. S. 651, at l. c. 653-654, says: "The right set up in the bill is one under Federal Constitution. Whether the state court denied that right or failed to give it due recognition is a question upon which the plaintiffs are entitled to invoke the judgment of this Court. Our jurisdiction is not affected because the existence of the right for which constitutional protection is claimed depends upon state law." The language in *Davis* v. *Wechsler*, 263 U. S. 22, is especially appropriate here. There this Court said, l. c. 24: "We are of opinion that the judgment must be reversed. Whatever spring*es* the state may set for those who are endeavoring to assert rights that the state confers, the assertion of Federal rights, when plainly and reasonably made, is not to be defeated under the name of local practice. • • • If the Constitution and laws of the United States are to be enforced, this Court cannot accept as final the decision of

the state tribunal as to what are the facts alleged to give rise to the right or to bar the assertion of it even upon local grounds. Creswill *v.* Grand Lodge, K. P. 225 U. S. 246, 56 L. Ed. 1074, 32 Sup. Ct. Rep. 822." See also *First National Bank* v. *Hartford*, 273 U. S. 548, l. c. 553.

The opinion of the Supreme Court of Missouri in Division 1 quoted a part of an allegation (193 S. W. (2d) l. c. 590, end 2d column) and then ruled that an action for libel was misjoined with an action for conspiracy, whereas the allegation (299-306) as to the false statements in appellees' briefs filed in the trial court alleged them to be "additional overt acts, pursuant to said conspiracies" (301), affecting the innocent and trusting judge of said court and causing him to sustain demurrers. The admission by the demurrers, in view of the fact that appellants' action was based on a conspiracy to deprive appellants of their federal rights, and the decision of the Supreme Court of Missouri to the effect that such overt acts constituted misjoinder of an action for libel and an action for conspiracy, is in conflict with the decision of this Court in *Truax* v. *Corrigan*, 257 U. S. 312, l. c. 328, wherein this Court reversed the decision of the Supreme Court of Arizona in a case in which it held that libelous publications by conspirators authorized relief in proceedings other than in the case then before the court. In reversing, this Court pointed out that "• • • such libels against the plaintiffs, though committed by thi particular class of tort-feasors (*Truax* v. *Bisbee Local, C. W. U.* 19 Ariz. 379, 171 Pac. 121), still the tort here committed was not a mere libel of plaintiffs. That would not have had any such serious consequences. The libel of the plaintiffs here was not the cause of the injury; it was only one step or link in a conspiracy unlawfully to influence customers."

Herein, the false briefs were merely a step or link in a conspiracy wrongfully to influence courts.

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D. There Was No Misjoinder of Causes of Action or of Parties Plaintiff

(a) The finding in the State court's opinion that the petition failed to allege joint ownership is contradicted by the pleading itself, and by the decision of the Supreme Court of Missouri applicable to its allegations.

The Supreme Court of Missouri overlooked the fact that, following its own example in the companion case of *In re Moffett Brothers Partnership*, 345 Mo. l. c. 745, wherein it said that appellants herein there "• • • in both of her capacities appealed. We hereinafter refer to her as appellant." So, following that precedent, the appellants' pleading alleged (154-155) that "Plaintiffs • • • will be described herein as plaintiff."

It was sufficient to alleged joint ownership in both capacities to allege that "plaintiff is lawful owner" (286, 322) of the properties of which she was so deprived. (*Duff* v. *Eichler*, 336 Mo. 1164, l. c. 1168; *The Planet Property and Financial Co.* v. *Railway Co.*, 115 Mo. 613, l. c. 619; *Jones* v. *Schaff Bros. Co.*, 187 Mo. App. 597, 602).

The pleading alleges not only that plaintiff in both capacities (286) "is lawful owner" of the properties of which she was so deprived, but also that said property (322) "is, and was, a part of the gains of the industry of plaintiff and her late husband, Thomas S. Moffett, the ownership and enjoyment of which by plaintiff and her said husband was recognized by Section 4 of Article II of the Missouri Constitution." It further alleged that the overt acts of the appellees "deprived them of the natural rights to the enjoyment of said gains of their own industry • • • Plaintiff further states that the property of which plaintiff was so deprived consisted of both real and personal property, and that the interests of plaintiff in the said property were and are intermingled, as shown herein,

which interests have been lost to plaintiff jointly in said capacities as the result of the same overt acts and transactions by reason of the matters and things stated and alleged herein, and as a direct result of the wrongful acts of the defendant pursuant to the conspiracies herein alleged" (322). See Syllabus 22, Thomassen's Estate, 171 S. W. (2d) 555.

(b) Even had there been a misjoinder of parties plaintiff, such misjoinder is not a ground of demurrer under Section 922 R. S. Mo. 1939, and could not constitute the basis for a dismissal under Section 948, authorizing dismissal if three petitions have been found insufficient on demurrer.

(c) In *Scott* v. *Alton Banking Co.*, 175 S. W. 920, and *Fadler* v. *Gabbert*, 333 Mo. 851, the Missouri Supreme Court has expressly decided that the inclusion of too many parties, or misjoinder of parties plaintiff, does not render a petition demurrable on the grounds of a defect of parties plaintiff.

(d) In the authorities cited in the opinion, to-wit: *Hallen* v. *Smith*, 305 Mo. 157, and *State* v. *Trimble* (Mo.) 262 S. W. 357, that question was not in issue. *Hallen* v. *Smith* dealt with parties defendant. It was not a decision on a pleading, but merely held that the evidence failed to show that one defendant was liable. *State* v. *Trimble* was an opinion by the court *en banc*, in which only two judges concurred and two dissented, and two concurred in the result. In *State ex rel. Hopkins* v. *Daues*, 319 Mo. l. c. 740, such a decision was held not to be a decision of the Court *en Banc*. There is no difference between this case and *Kammeyer* v. *City of Concordia*, 352 Mo. 742, wherein too many plaintiffs were joined and hence, according to the opinion herein, stated no joint cause of action. Nevertheless, the Supreme Court of Missouri reversed. That was a conspiracy case in which, in addition to alleging the conspiracy (l. c. 745) "also

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alleged that said persons committed thirty-two fraudulent acts in carrying out the conspiracy. * * * Defendants' demurrer to the petition was sustained. On plaintiffs' refusal to further plead, the court dismissed the petition. Since the petition there did not state a joint cause of action, and the judgment of dismissal was reversed, the law as declared in the opinion herein is directly contrary thereto.

(e) Both the State and Federal decisions construing Section 922 hold that joinder of an heir and administrator as parties plaintiff to recover property, or damages for property of which they were deprived by the same acts by the same defendants, was not demurrable on the ground of misjoinder of parties plaintiff (*Armour* v. *Roberts*, 151 Fed. 846, 848, C. C. A. 8). This Court in *Miller* v. *Union Pacific Railroad Co.*, 290 U. S. 220-227, did not question the propriety of the same person as administrator of two estates, based on same wrongful acts as here, joining as plaintiffs in the same suit in a Missouri court under Section 922 of the Missouri Code. The Missouri court in *Hendon* v. *Kurn*, 351 Mo. 980, citing said opinion of this Court, affirmed a judgment brought by "the Widow and administratrix of decedent's Estate," wherein the propriety of the joinder was recognized.

Section 850 and 851 R. S. Mo. 1939 made the principle applicable in equity suits as to the joinder of parties plaintiff applicable herein (*McLain* v. *Atlas Assur. Co.*, 67 S. W. (2d) 849 (Mo.), and prevented misjoinder. And this was the Missouri and Kansas law. (*Hotchkiss* v. *Ogle*, 153 Kan. 156, l. c. 162; *Citizens Trust Co.* v. *Tindle*, 272 Mo. 681, l. c. 693; *Wilson* v. *Hartford Fire Ins. Co.*, 300 Mo. 1, l. c. 39-40; *Young* v. *Boatmen's Bank*, 171 S. W. (2d) 552, by Court *en Banc*, Syl. 22 and l. c. 563-564, incorporating *Parker* v. *Simpson*, 180 Mass. 334-341, into the law of Missouri by citing and approving it at l. c. 564; *Burford* v. *Aldridge*,

165 Mo. 419; *Crenshaw* v. *Ullman*, 113 Mo. 633, l. c. 638; *Butler* v. *Lawson*, 72 Mo. 227; *Meyer* v. *Adler*, 188 Mo. App. 607).

And so the alleged non-federal ground is not adequate justification for depriving appellants of their federal rights, nor sufficient to sustain the state judgment under the decisions of this Court in *Davis* v. *Wechsler*, 263 U. S. 22; *Ward* v. *Board of Commissioners of Love County*, 253 U. S. 17; *Lawrence* v. *State Tax Commission*, 286 U. S. 276; *Ancient Egyptian Arabic Order of Nobles of the Mystic Shrine* v. *Michaux et al.*, 279 U. S. 737; *Brown* v. *Mississippi*, 297 U. S. 278; *Abie State Bank* v. *Bryan*, 282 U. S. 765.

The foregoing authorities establish the invalidity of the finding of the state court to the effect that: "Appellants have not been denied due process. They have not only had their day in court, but their months and years" (193 S. W. (2d) l. c. 592, bottom 2d column). Appellants' complaint in this case is that she has been kept too long in court by the appellees, whose fourteen fictitious suits have been pending since 1930, for the purpose of preventing her, in violation of her federal rights, from getting possession of and enjoying the fruits of her husband's and her own industry, in addition to the loss resulting from the void judgments in the Kansas courts.

The state supreme court cites two cases by this Court wherein it denied certiorari, overlooking the consideration often stated by this Court that a denial of certiorari is never a ruling of this Court on the merits. In the case reported in 298 U. S. 675, no party appellee in this case was a party in that case (*Bigelow* v. *Old Dominion G. M. Co.*, 225 U. S. 111). The rule applied in *Bigelow* v. *Old Dominion &c*, 225 U. S. 111, conflicts with the finding of the state supreme court herein.

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The opinion cites Kansas cases which, together with those of this Court, were relied upon by appellees in the companion case of *In re Moffett Brothers Partnership Estate*, 345 Mo. 741, and concerning which cases that Missouri court found facts which devitalized said Kansas judgments and proceedings (345 Mo. 741-751). The last decision controls (*Treinies* v. *Sunshine Mining Co.*, 308 U. S. 66). See also *State ex rel. Miller's Admr.* v. *Bindlinmaier*, 26 Mo. 483, l. c. 486; *State ex rel. Mueller's Admr.* v. *Reinhardt*, 31 Mo. 95.

Not only did the decision in 345 Mo. 741 devitalize the Kansas judgments by its finding that the interests of the estate represented by Commerce Trust Company in that litigation were in conflict, which finding was the basis or premises of the judgment, but said Kansas judgments were also devitalized under the principles formulated in *Hazel-Atlas Glass Co.* v. *Hartford Empire Co.*, 322 U. S. 238, which principles have been incorporated into the jurisprudence of Missouri by its Supreme Court in *Sutter* v. *Easterly*, 189 S. W. (2d) 284, l. c. 288.

The decision of the Supreme Court of Missouri *en Banc* in *Leichty* v. *Kan--- City Bridge Co.*, 190 S. W. 2d 201, authorized appellants to recover herein notwithstanding the rendition of said Kansas judgments, for there the Supreme Court of Missouri *en Banc* overruled many cases denying a right to recover unless the void judgments were set aside in equity, citing *Stuart* v. *Dickinson*, 290 Mo. 516, and many other decisions including that of *Williams* v. *North Carolina*, 325 U. S. 226. The Supreme Court of Missouri in Division 1, by failing to give appellants the benefit of the law declared by the Supreme Court of Missouri *en Banc* in *Leichty* v. *Kansas City Bridge Co., supra*, denied appellants the protection of the law guaranteed by the XIVth Amendment. The Federal Question is raised in the Motion for Rehearing

or to transfer to the Court *en Banc*, which was the first opportunity to do so.

The question as to whether or not an action to recover damages for loss resulting from a judgment fraudulently obtained, and for said reason void, whether in a domestic or foreign jurisdiction, is elaborately discussed in *Griffith* v. *Bank of New York*, 147 Fed. (2d) 899. Certiorari to review said decision was denied on June 4, 1945, 325 U. S. 874.

The finding of the Supreme Court of Missouri that appellants have had their day in court with reference to the Kansas litigation mentioned in the petition is based solely upon the opinions rendered in the Kansas courts, which were not before the Supreme Court of Missouri in this case, under the practice recognized in Missouri (*Friedman* v. *Maryland Casualty Co.*, 228 Mo. App. 680, l. c. 688). And in making such finding the court wholly ignored the facts pleaded in the petition which, being admitted to be true by appellees' demurrers, invalidated all of the judgments of the Kansas courts for the purpose of the decision.

The judgment of affirmance by the supreme court of Missouri is not based upon the provisions of Sections 922 and 948 of the old code. Since neither section authorizes a demurrer for misjoinder of parties plaintiff, the court was without jurisdiction to inflict a penalty on a ground not within the letter or spirit of either section, and thus deprive appellants of their Federal or State rights (*Nicholas* v. *Kelley*, 159 Mo. App. 20, l. c. 29; *State ex inf.* v. *Railroad*, 238 Mo., l. c. 612).

Section 922 never did include the ground of misjoinder of parties plaintiff as a ground of demurrer, though it did include the failure to state a cause of action and a misjoinder of causes of action as grounds for demurrer. These sections, while in force on the day the trial court rendered its judgment, yet in its opinion the supreme court of Mis-

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souri expressly stated that said Section 922 is "now repealed" (193 S. W. (2d) l. c. 590, top of page.) Section 948 was also repealed by the new Code. Hence, when the judgment of affirmance was entered on February 11, 1946, the Supreme Court was bound to apply the law as changed, and to refrain from applying the repealed law in support of the judgment (*Simpson* v. *Stoddard County*, 173 Mo. 421). And the failure to follow the law as declared by said decisions *en banc* denied to appellants the equal protection of the laws under the XIVth Amendment.

Since the state supreme court could not, on reversal, enter the same judgment, since said Sections 922 and 948 R. S. Mo. 1939 are repealed, then such judgment on reversal would not be "futile," and the principle stated in *Murdock* v. *Memphis*, 20 Wall. 590, l. c. 635, and kindred cases, as a reason for failure to reverse because of error as to federal questions has no application, under the rule stated by this Court in *American Steel Foundries* v. *Tri-City C. T. Council*, 257 U. S. 184, l. c. 201, when it said: "The complainant had no vested right in the decree of the district court while it was subject to review. • • • The circuit court of appeals was called upon to approve or to change the decree, and was obliged, therefore, to regard the new statute in his conclusion, and so are we."

The decision of the supreme court of Missouri in the companion case of *In re Moffett Brothers Partnership Estate*, 345 Mo. 741, finding that Commerce Trust Company and B. C. Howard represented conflicting interests, was a finding with reference to conflicting interests which was *res judicata* and devitalized the Kansas judgments and proceedings under the law of the State as declared by its Supreme Court *En Banc* (*State ex rel. McKittrick* v. *Missouri Public Service Corporation*, 351 Mo. l. c. 973). Said finding constituted the premises on which the judgment was based,

and was as conclusive as the judgment itself. In failing to give effect to said decision, on the issue as to the invalidity of the Kansas judgments, the State Supreme Court in Division 1 denied to appellant the protection of the laws as required by Section 1 of the XIVth Amendment.

The fact that the Supreme Court of Missouri, in Division 1, would fail to give effect to its own decision could not be anticipated. So that this question was first raised in the petition for rehearing and to transfer to the Court *En Banc*, and is therefore timely (*Saunders* v. *Shaw*, 244 U. S. 317, l. c. 320). See also *Brinkerhoff-Faris Trust & S. Co.*, 281 U. S. 673.

Notwithstanding the Federal questions involved in this case were such as gave the Supreme Court of Missouri *En Banc* appellate jurisdiction under Section 3 of Article V of the Missouri Constitution of 1945, Section 9 of which Article provides: "A cause in the Supreme Court shall be transferred to the Supreme Court *En Banc* when • • • a federal question is involved," which provisions of said Constitution are substantially the same as Section 4 of the Amendment of 1890 to the Missouri Constitution of 1875. That in overruling the said motion to transfer to the Court *En Banc* said Division 1 denied to appellants the benefit of said Constitutional provisions of the State, and thereby denied to appellants the protection of each and all of the provisions of Section 1 of the XIVth Amendment of the Federal Constitution.

Said Missouri Supreme Court *En Banc*, in *Lumber Co.* v. *Harvester Co.*, 215 Mo. 221, l. c. 234, holds that the decisions of this Court control the State court as to what constitutes a federal question within the meaning of the Missouri Constitution.

The fact that a Kansas state judge was a party to the conspiracy and participated in some of the overt acts oper-

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ates to make the question here involved one of the most important which was ever submitted to this Court. The question of the personal liability of said state judge is not directly involved in this case, though the validity of the judgments rendered by said judge, pursuant to said conspiracy, is involved. The fact that, in *Picking et al.* v. *Pennsylvania R. Co. et al.*, 151 F. (2d) 240, the circuit court of appeals for the third circuit held that a judge who denied a litigant before him the protection of due process guaranteed by the XIVth Amendment, was personally liable to said litigant under R. S. Section 1979 (Sec. 43 Title 8 U. S. C.), operates to render the case in that circuit court of appeals, and that of the supreme court of Missouri herein, cases wherein the judgments, decisions and opinions are in direct conflict with each other as to the basic principle involved. In that case the court declared the legal effect of R. S. Section 1979 as follows, l. c. 250: "But the privilege as we have stated was a rule of the common law. Congress possessed the power to wipe it out. We think the conclusion is irresistible that Congress by enacting the Civil Rights Act *sub judice* intended to abrogate the privilege to the extent indicated by that act and in fact did so. Section 1 of the Third Civil Rights Act explicitly applied to 'any person.' R. S. Section 1979 applies to 'Every person.' We can imagine no broader definition. The statute must be deemed to include members of the state judiciary acting in official capacity. The result is of fateful portent to the judiciary of the several states."

Under the principle there applied the judgments rendered by the Kansas state district judge, and the orders made by him to give effect to these void judgments, were all void. As above stated, of course the question of his personal liability is not involved, but the principle which renders him liable renders all the proceedings before him void.

This consideration renders the judgment of the Supreme Court of Missouri and the judgment of the United States circuit court of appeals for the third circuit in such direct conflict as to make the question involved of such great public and national importance as to necessitate a review herein. This consideration necessitates review on this appeal under all the provisions of Section 237 Judicial Code. (*Noble* v. *Oklahoma City*, 297 U. S. 481, 489, 56 S. Ct. 562, 80 L. Ed. 816; *Penn General Casualty Co.* v. *Pennsylvania ex rel. Schnader*, 294 U. S. 189, 190, 55 S. Ct. 386, 79 L. Ed. 850; *Palmer Clay Products Co.* v. *Brown*, 297 U. S. 227, 228, 56 S. Ct. 450, 50 L. Ed. 655; *Minnie* v. *Port Huron Terminal Co.*, 295 U. S. 647, 55 S. Ct. 884, 79 L. Ed. 1631; *Gilvary* v. *Cuyahoga Valley Ry. Co.*, 292 U. S. 57, 54 S. Ct. 573, 78 L. Ed. 1123.)

The Supreme Court of Missouri held that appellants' federal rights did not depend upon the supreme law, but that they depended upon the discretion of the trial judge (193 S. W. (2d) l. c. 591 (4), contrary to *Meierhoff* v. *Hansel*, 294 Mo. 195, and the *En Banc* decision in *State ex rel.* v. *Hackman*, 274 Mo. 551, l. c. 558, thus denying appellants each and all of the rights secured to them by Section 1 of the XIVth Amendment to the Constitution.

To the said jurisdictional defects is added the greatest defect, to-wit: that Commerce Trust Company, as purported Missouri executor of the estate of John Moffett, and as purported Missouri administrator of Moffett Brothers partnership estate, without possession of or title to any assets in the State of Kansas of either estate (231), went to Kansas and fraudulently confessed a judgment against itself. That Commerce Trust Company could not lawfully appear in the Kansas district court to give it jurisdiction to render a judgment against it as Missouri partnership administrator and partially pay it with said assets (*Helme*

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v. *Buckalew*, 229 N. Y. 363, per Cardozo, J.; *McMaster* v. *Gould*, 240 N. Y. 379; *Thorburn* v. *Gates*, 225 Fed. 613; *Strohmeyer* v. *Aldrich*, 227 Fed. 960; *Estate of Thompson* v. *Coyle & Co.*, 339 Mo. 410). Said facts alone violated appellants' rights under Section 1 of the XIVth Amendment.

Picking et al. v. *Pennsylvania R. Co. et al.* first appeared in 3 F. R. D. 425 on April 25, 1944. The case was dismissed by senior federal Judge Albert W. Johnson of the middle district of Pennsylavnia. That decision was reversed by the circuit court of appeals for the third circuit on August 28, 1945, (See 151 F. (2d) 240). A rehearing was denied on October 3, 1945 (152 F. (2d) 753). On January 11, 1946, similar rulings were made, as shown in 5 F. R. D. 76, 84. The report in *United States* v. *Johnson*, 65 Fed. Sup. 42 and 65 Fed. Sup. 46 indicates that the district judge who dismissed the *Picking* case was indicted for conspiracy to render, and rendering, decisions between the years 1934 and December 1944.

It appears from the foregoing that twice a federal district court has followed the law as declared twice by the circuit court of appeals in the *Picking* case, and that the law as thus declared is the law in the Third Circuit. It also appears that the judge who dismissed same on April 25, 1944, was charged in an indictment to be a corrupt judge for acts committed during a period which included the date of dismissal. However, the part of the indictment included in the report does not mention the *Picking* case.

Appellees have admitted that the acts of the Kansas state district judge, which they twice admitted to be true (once in their demurrers to the third amended petition and once in their demurrers to the fifth amended petition) were acts of a corrupt judge (299). (Appellants had not used that language.)

The state court, nevertheless, affirmed a judgment of the circuit court of Jackson County dismissing the petition herein and finding that appellants were accorded due process of law by the judge whom appellees thus twice admitted to be corrupt. This circumstance discloses that at least in the State of Missouri the law with reference to the rights of a litigant under the Civil Rights Acts and the Civil War Amendments has been declared differently from the way in which it has been declared by the highest court in the Third United States Circuit,—a fact which of itself renders the question here involved one of great public importance.

As to appellants, the Kansas litigation, as admitted by appellees, indicated the existence of a condition similar to that in England in 1688, well described in *Rex* v. *Rowan* as a time "When the devoted benches of public justice were filled by some of those foundlings of fortune, who, overwhelmed in the torrent of corruption at an early period, lay at the bottom, like drowned bodies, while soundness or sanity remained in them; but, at length, becoming bouyant by putrefaction, they rose as they rotted, and floated to the surface of the polluted stream, where they were drifted along, the objects of terror, and contagion, and abomination." Corrupt judgments are always void.

The state court ignored the allegation that appellees kept fictitious suits for $2,539,366.80 (268), with six per cent interest per annum, pending since 1930 for the purpose of depriving appellants of the rights specified in Section 1 of the XIVth Amendment. The state court ignored the provisions of Section 10 of Article II of the state constitution of 1875, and of Section 14 of Article I of the state constitution of 1945, commanding that right and justice shall be administered without denial or delay. Appellants were entitled to the protection of said provisions of the state con-

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stitution with reference to said fictitious suits, and its protection was denied by the state court. To so deny the protection of the state constitution was also a direct violation of the command of the provisions of Section 1 of the XIV Amendment, and each of them.

The presidential message of February 5, 1937, to the Congress gives the basic reason for said constitutional provisions thus:

> "'Delay in any court results in injustice.
>
> 'It makes lawsuits a luxury available only to the few who can afford them or who have property interests to protect which are sufficiently large to repay the cost. Poorer litigants are compelled to abandon valuable rights or to accept inadequate or unjust settlements because of sheer inability to finance or to await the end of a long litigation. Only by speeding up the processes of the law and thereby reducing their cost, can we eradicate the growing impression that the courts are chiefly a haven for the well-to-do.'"

Appellees, acting in concert with appellee Howard, instituted said fictitious suits. As recently as May 14, 1946, the question with reference to the unlawful acts of appellees through Howard is well stated:

> "There is nothing better settled than that a lawyer may not lawfully represent interests which are conflicting in the sense that it would be his duty, on behalf of one client, to contend for that which his duty to another client would require him to oppose. Rule 4.06 of the Supreme Court of Missouri; Moffett Bros. Partnership Estate *v.* Moffett, 345 Mo. 741, 137 S. W. (2d) 507; Hoffman *v.* Hogan, 345 Mo. 903, 137 S. W. (2d) 441 • • •"
>
> In Re Pfiffner's Guardianship, 194 S. W. (2d) 233, l. c. 236.)

The decision in *In re Moffett Brothers Partnership Estate*, 345 Mo. 741, for a number of years, has been a guide

to other courts as to the question decided in that case. Yet the Supreme Court of Missouri, in its opinion herein, wholly ignored its said finding in that case that the acts of Mr. Howard and Commerce Trust Company in the Kansas litigation were unlawful, and ignored the consideration that all the appellees, acting in concert and conspiracy, were liable for the damage caused by said unlawful acts. In thus failing to give effect to said judgment as to said unlawful acts, the state supreme court also denied appellants' Federal rights.

These facts necessitate an assumption of jurisdiction of this case so that the supreme law may be enforced.

Appellants adopt and make the Motion for Rehearing and to Transfer to the Court *en Banc* in the State Supreme Court, and Assignments of Error herein filed, a part hereof, as fully as if set forth as a part of this jurisdictional statement.

Whenever the word CONSTITUTION has been used in the foregoing statement, the Constitution of the United States is meant, unless otherwise specified.

It is therefore respectfully submitted that this Court has jurisdiction of this appeal under Section 237(a) of the Judicial Code as Amended. And, as to those Federal Questions not involving the validity of any statute, this Court has jurisdiction on this appeal to grant the same relief as on certiorari under Section 237(b) of the Judicial Code as Amended (*Prudential Life Insurance Co.* v. *Cheek*, 259 U. S. 530; *Flournoy* v. *Wiener*, 321 U. S. 253-275, l. c. 263).

A. E. WATSON,
MARTIN J. O'DONNELL,
Attorneys for Appellants.

EXHIBIT "A"

193 S. W. 2d, pages 588 to 592

MOFFETT v. COMMERCE TRUST COMPANY, ET AL.

No. 39509

SUPREME COURT OF MISSOURI, DIVISION No. 1

Feb. 11, 1946

Rehearing Denied April 8, 1946

Appeal from Circuit Court, Jackson County; Albert A. Ridge, Judge.

Actions by Louise McGrew Moffett and Louise McGrew Moffett, as executrix of the estate of Thomas S. Moffett, deceased, against the Commerce Trust Company and others, to recover damages, etc., wherein defendant filed separate demurrers to plaintiffs' fifth amended petition. From a judgment sustaining the demurrers and dismissing the petition, plaintiffs appeal.

Affirmed.

CLARK, Judge:

On December 30, 1944, Judge Ridge, Presiding Judge and Judge of Division 6 of the Circuit Court of Jackson County, sustained separate demurrers filed by the various defendants to plaintiffs' fifth amended petition on the ground of misjoinder of parties plaintiff and, finding that a third petition of plaintiffs had been found insufficient on said ground, dismissed the petition and rendered judgment against plaintiffs for treble costs under Section 948, Revised Statutes Missouri 1939, Mo. R.S.A. From that judgment plaintiffs have appealed.

The original petition with Louise McGrew Moffett as sole plaintiff was filed August 22, 1941. Afterwards the first amended petition was filed adding Mrs. Moffett, as

executrix of the estate of Thomas S. Moffett, as a plaintiff, and adding two new defendants.

To the first amended petition respondent Kopp filed a demurrer on the ground that no cause of action was stated against him. The other respondents attacked the petition by separate motions. All these were overruled by Judge Buzard, then presiding judge. Afterwards, respondents filed separate demurrers to this petition and they were sustained by Judge Terte, then presiding judge. Appellants filed a second and later a third amended petition. Judge Wright, then presiding judge, sustained separate demurrers to this petition. Successively appellants filed fourth and fifth amended petitions, demurrers to the latter being sustained by Judge Ridge as stated at the outset of this opinion.

The fifth amended petition, with attached exhibits, occupies two hundred pages of the printed record. The briefs are numerous and lengthy, aggregating thirteen hundred and fifty pages, citing and quoting from hundreds of decisions, many of which, we think, have no relevancy to any issue here involved. Appellants claim error under twenty-two numbered assignments, some being mainly a repetition of others. We have considered all of these assignments, but see no useful purpose in discussing each one separately.

Appellants contend: that the reason assigned by Judge Ridge for sustaining the demurrers, misjoinder of parties plaintiff, was not authorized by Section 922, Revised Statutes Missouri 1939, Mo. R.S.A.; that he had no jurisdiction to pass on the demurrers without at least two days' notice to appellants under court rules; that he was precluded from passing on the demurrers because of previous rulings of Judge Buzard; that the alleged demurrers were really speaking demurrers, motions or answers; that it was proper to join appellants (as an individual and as executrix) as plaintiffs, and that this court so held in In Re Moffett Bros. Partnership, 345 Mo. 741, 137 S. W. 2d 507; that the ruling of Judge Wright in sustaining demurrers to the third amended petition was void because induced by false statements in respondents' briefs; that Section 948, supra, pur-

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porting to require dismissal and award of treble costs after three petitions have been held invalid, is unconstitutional.

(1) Appellants are in error in construing the new Civil Code, Mo. Laws 1943, pp. 353-397, Mo. R.S.A. Sec. 847.1 et seq., as declaring what the law was at the date of its passage. They reach this result by emphasizing the word "is" in the sentence "misjoinder of parties *is* not a ground of demurrer to an action," but they overlook further provisions of the Code, Sec. 3, to-wit: "This code will take effect on *January 1, 1945.* It governs all proceedings in actions brought *after* it takes effect and also *further* proceedings in all actions then pending, except * * *." (Emphasis ours.) Section 922, although now repealed, was in force on December 30, 1944, the date Judge Ridge ruled on the demurrers. The section does not in terms list "misjoinder of parties" as a ground of demurrer, but does, among other grounds, list "defeat of parties plaintiff or defendant," and failure to "state facts sufficient to constitute a cause of action." Appellants say that as we copied the section from a law of New York we also adopted the construction placed upon it by the courts of that state, and cite some New York cases holding that misjoinder of parties is not a ground of demurrer. Appellants also cite Fadler *v.* Gabbert, 333 Mo. 851, 63 S. W. 2d 121, and Kammeyer *v.* City of Concordia, 352 Mo. 742, 179 S. W. 2d 76. In the Kammeyer case we held that a demurrer was properly sustained as to unnecessary plaintiffs, but that this did not authorize a dismissal as to the remaining plaintiffs. In the Fadler case (333 Mo. 851, 63 S. W. 2d 127) we recognized the distinction between "defect of parties" and "misjoinder of parties", but said that "misjoinder of parties", although not listed in the statute, is a ground of demurrer because in that situation the petition does not state a cause of action. See also Hallen *v.* Smith, 305 Mo. 157, 264 S. W. 665; State *v.* Trimble, Mo. Sup., 262 S. W. 357.

We will briefly set forth the general nature of the petition, but deem it unnecessary to make a complete summary. It alleges: that appellant's husband died testate, a resident of Missouri, and she is executrix and sole devisee; that he was a partner in several firms having a

common office in Kansas City, Mo., and owning property and doing business in various states; it purports to trace the administration of these partnerships through the courts of Missouri and Kansas; alleges that respondents have unlawfully appropriated much of the assets of the various partnerships by means of false book entries, perjured testimony, fictitious suits and in other ways; it recounts suits in various courts, one brought by Mr. Moffett in his lifetime and others after his death; says that judgments rendered in these cases are void because of perjured testimony at the trials or lack of jurisdiction because of void statutes; alleges that respondents have damaged appellant by libeling her and discrediting her attorneys. The petition says that the property of which she has been deprived is the fruit of the industry of herself and husband, but does not allege that she contributed any of her separate means either in money, property or the value of her labor. In another place (paragraph 9) appellant seems to claim sole ownership by virtue of her husband's will.

Appellants cite many cases decided by the courts of this and other states, but we feel confident that no case cited or that can be cited approves a petition such as the instant one. We concede that in some circumstances an executor and a devisee may join as plaintiffs. We also adhere to our previous ruling in the Kammeyer case, supra. But here we have a different situation. The petition attempts to state a joint cause of action in favor of Mrs. Moffett as an individual and in her favor as executrix of her deceased husband's estate. It does not seek to recover specific property belonging either to her or to the estate, but prays recovery on account of alleged wrongful acts which it is alleged resulted in damages to her and the estate jointly. True, the petition alleges "that said property of which plaintiff was so deprived is, and was, a part of the gains of the industry of plaintiff and her late husband." That is hardly sufficient to allege joint ownership, but even if it be so construed there are other allegations which show that the damages claimed could not possibly accrue to Mrs. Moffett and the estate jointly. The petition seeks to recover damages for alleged wrongful acts pursuant to a conspiracy said to have been entered into prior to the death

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of Mrs. Moffett's husband and continued after his death. Some of the acts complained of are alleged to have been performed long after Mr. Moffett's death and after the institution of the suit. Among other things it is alleged that some of the respondents, in briefs filed in the case, "published of and concerning plaintiff in both capacities the following false, malicious, scandalous, defamatory, unprivileged and libelous statements * * *." Then in the prayer it is stated "that her reputation for integrity has been injured by said libelous and defamatory statements and by said wrongful acts * * * resulting in actual damage to plaintiff in the sum of $1,000,000.00." The prayer also is for punitive damages in the sum of $1,500,000.00.

(2, 3) Although it is alleged that libel was directed at Mrs. Moffett "in both capacities," it is clear that any damages recovered on account of this allegation could only accrue to her as an individual, and the executor, devisees or creditors of the estate would have no interest in such recovery. These allegations and many others show that no joint cause of action is stated. Such defect appearing on the face of the petition, under the old code, could be reached by demurrer. The defect is more than a mere inclusion of an unnecessary plaintiff, as in the Kammeyer case, supra. In the instant case the demurrers reached the entire petition for the trial court had no authority to sort out the allegations, if any, which constitute a cause of action in favor of Mrs. Moffett in one capacity and sustain the demurrers only as to the allegations relating to her in the other capacity. The petition fails to state a joint cause of action and it was unnecessary for the trial court and is unnecessary for this Court to determine whether a cause of action is stated in favor of Mrs. Moffett in either capacity. Rockwood *v.* Crown Laundry Co., 352 Mo. 561 178 S. W. 2d 440, loc. cit. 443; Doerr-Engel *v.* Tide Water Oil Co., 342 Mo. 1141, 119 S. W. 2d 402; Niederberg *v.* Golluber, Mo. Sup., 162 S. W. 2d 592, l.c. cit. 599. Judge Ridge sustained the demurrers on the sole ground of misjoinder of parties, but the demurrers also attacked the petition for misjoinder of alleged causes of action and for failure to state a cause of action. We think the reason assigned

by the trial court is sufficient, but his ruling can be sustained on the other grounds mentioned. Hartvedt *v.* Harpst, Mo. Sup., 173 S. W. 2d 65, loc. cit. 68; Bushman *v.* Barlow, 321 Mo. 1052, 15 S. W. 2d 329, 330.

(4) The circuit court of Jackson County is a multiple judge court. Its rules provide that the court en banc shall from time to time select one of the judges as Presiding or Assignment Judge, whose duty it is to pass upon motions and demurrers, make up the issues and assign cases to the different divisions, including his own division. Two days' notice is necessary to call up a demurrer unless waived or a different time be fixed by the Presiding Judge. The demurrers to the fifth amended petition were filed on or before December 6, 1944. Then appellants filed a reply on the theory that the demurrers were really answers, which reply was after a hearing stricken out on respondents' motions. Then on December 30, 1944, with all parties present by counsel, the demurrers were presented to Judge Ridge. Appellants, by leave of court, withdrew paragraph 45 of their fifth amended petition, and respondents refiled their demurrers. Appellants requested at least two days' delay on the ground that the demurrers had just been filed. The court, in the exercise of proper discretion, denied this request. Kuh *v.* Garvin, 125 Mo. 547, 28 S. W. 847, loc. cit. 851. The withdrawal of paragraph 45, which related to a suit brought by respondent Kopp against Mrs. Moffett, in no way affected the point made in the demurrers as to misjoinder of parties plaintiff or failure to state a cause of action. We see no violation of the rules.

(5) Appellants say that Judge Ridge was without jurisdiction to dismiss the petition without determining that the previous demurrers had been properly sustained. The correctness of the rulings on former petitions was not before Judge Ridge and, although previous petitions are printed in the abstract, the question is not before us. By pleading over appellants waived the error, if there was such. Voorhees *v.* Louisiana Purchase Co., 243 Mo. 418, 147 S. W. 783; Tobin *v.* Bell Telephone Co., Mo. Sup. 199 S. W. 952; Buder *v.* Reller, Mo. Sup., 190 S. W. 2d 213.

Appellants' claim that Judge Ridge was under duty to reconsider the rulings of the former presiding judges is inconsistent with the claim that Judge Buzard's ruling is res judicata.

(6, 7) Appellants contend that Judge Ridge's ruling on the demurrers was invalid because constituting collateral attacks on Judge Buzard's former rulings; further, that the demurrers to the fifth amended petition were in truth motions, speaking demurrers or answers. We find no merit in these contentions. The pleadings ruled upon by Judge Buzard were motions to strike or to make more definite, except that respondent Kopp filed a separate demurrer on the grounds that the petition showed that he was not a necessary party and stated no cause of action against him. Later when demurrers to amended petitions were regularly presented successively to Judges, Terte, Wright and Ridge as assignment judges, each was under a duty to rule the law as he saw it regardless of the view that Judge Buzard may have had when passing on the previous motions. There was no collateral attack. The rulings were by the same court, although by different judges, on different petitions and at different stages of the case. State ex rel. *v.* Landon, 304 Mo. 654, 265 S. W. 529, 532; Kinsella *v.* Kinsella, 353 Mo. 651, 183 S. W. 2d 905, 908. The pleadings ruled upon by Judge Ridge were demurrers, nothing more. They may have contained repetition and surplusage, but the complaint as to defect of parties and failure to state a cause of action were clearly stated. Such could be determined from the face of the petition.

(8, 9) In Re Moffett Bros. Partnership Estate, 345 Mo. 741, 137 S. W. 2d 507, grew out of an attorney fee allowed B. C. Howard for representing Commerce Trust Company as administrator of the partnership estate. Mrs. Moffett, individually and as executor of her husband's estate, resisted the allowance in the probate, circuit and supreme courts. No point was presented or decided as to Mrs. Moffett's right to appear in both capacities. The only point decided was that Howard was not entitled to an additional fee. 345 Mo. loc. cit. 745, 137 S. W. 2d loc. cit. 508. Some of the respondents in the instant case

were not parties to that suit. Certainly the decision in that case is not res judicata as to the sufficiency of the petition in the instant case. Appellants say that Judge Wright was induced to sustain demurrers to the third amended petition by false statements in briefs filed with him by some of the respondents; that, therefore, his ruling was void and could not be counted by Judge Ridge in holding three petitions had been held invalid. The question is not before us. If it was we would be concerned only with the correctness of Judge Wright's rulings, not his motives. For many reasons there is no merit in this contention; a sufficient reason is that appellants, by pleading over, waived the right to question Judge Wright's ruling.

(10) Appellants say that Section 948, supra, violates article 1, section 10, of the Federal Constitution, which prohibits a state from passing a bill of attainder. No authority is cited which remotely sustains this contention. This statute, until the effective date of our new Code, was in force for one hundred and twenty years. It has frequently been construed by this and other courts and, so far as we know, its constitutionality has never been assailed before. It does not resemble a "bill of attainder" or of "pains and penalties." See 16 C. J. S., Constitutional Law, sec. 452, p. 902, sec. 455, p. 903 It applies only to civil procedure, inflicts no penalty without a hearing, authorizes neither fine nor imprisonment, but only a money judgment for unreasonably consuming the time of courts and litigants and causing needless expense by filing defective petitions. Its constitutionality is presumed and appellants have offered nothing to rebut the presumption.

(11, 12) Nor does the failure of the section to specifically provide to whom the penalty shall be paid render it invalid. We think the trial court correctly interpreted the statute in rendering judgment for treble costs in favor of respondents.

Appellants make many other assignments of error; assailing the constitutionality of Missouri statutes relating to partnership estates, and the probate laws of both Missouri and Kansas; ask us to declare void certain decisions of the Supreme Court of Kansas; invoke the treaty between this

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country and France in 1803 and the "due process" and other provisions of the State and Federal Constitutions. Most if not all these questions have been decided adversely to appellants by courts of competent jurisdiction in suits brought by appellants or in which they actively participated as defendants. Moffett *v.* Moffett, 131 Kan. 582, 292 P. 947, 77 A. L. R. 294; Clark *v.* Andrews, 136 Kan. 23, 12 P. 2d 294; Clark *v.* Moffett, 136 Kan. 711, 18 P. 2d 555; Id. 290 U. S. 602, 54 S. Ct. 227, 78 L. Ed. 528; Moffett *v.* Robbins, D. C., 14 F. Supp. 602; Moffett *v.* Robbins, 10 Cir., 81 F. 2d 431, Id., 298 U. S. 675, 56 S. Ct. 940, 80 L. Ed. 1397. Appellants have not been denied due process. They have not only had their day in court, but their months and years. None of these assignments is germane to the question of whether the fifth amended petition contains a misjoinder of parties plaintiffs or fails to state a joint cause of action.

We hold that the judgment is correct in form and in accordance with law and it is therefore affirmed.

All concur.

EXHIBIT "B"

345 Mo., pages 741 to 751

In Re Moffett Brothers Partnership Estate, Styled on Abstract and Briefs as Commerce Trust Company and B. C. Howard *v.* Louise McGrew Moffett, and Louise McGrew Moffett as Executrix of the Estate of Thomas S. Moffett, Appellants.—137 S. W. 2d 507

Division One, March 6, 1940

Appeal From Jackson Circuit Court.—Hon. Brown Harris, Judge

Reversed and Remanded (with directions to enter judgment denying claimant additional fees in part and approving the payment of fees in part)

Bradley, C.:

September 10, 1936, B. C. Howard, an attorney, and hereinafter referred to as claimant, filed his petition in the

Probate Court of Jackson County (at Kansas City) asking for an allowance against Moffett Brothers partnership estate for legal services alleged to have been rendered the estate. The Commerce Trust Company was the administrator de bonis non of the estate, or so considered for purposes of this opinion. The petition alleged that the administrator employed claimant, and that since employment he "has continuously given legal advice and rendered legal services to the administrator for which he had received to date of filing petition the sum of $1300." Claimant further alleged "that the action of said administrator in the payment of said sum of $1300. as aforesaid, should be approved, and that said administrator should be authorized and directed to pay to" claimant "on account of legal advice and services rendered such additional amount as the court may deem right and proper in the premises."

Louise McGrew Moffett, individually, and as executrix of the estate of Thomas S. Moffett, her deceased husband, who was a member of the Moffett Brothers partnership, resisted the allowance of any further fee to claimant and endeavored to prevent the approval of the payment of the $1300. The matter, by appeal, reached the circuit court and that court, on January 25, 1938, allowed claimant an additional fee of $11,500 and approved the payment of the $1300. Louise McGrew Moffett, in both of her capacities, appealed. We hereinafter refer to her as appellant.

The record covers nearly 1400 pages and the briefs cover nearly 700 pages, and many alleged grounds are urged by appellant to support the contention that the judgment should be reversed, but the conclusion we have reached makes it unnecessary to consider but one of these grounds, viz., that, under the facts, claimant is not entitled to any fee from the Moffett Brothers estate.

Moffett Brothers, a partnership, of Kansas City, Missouri, was composed of John and Thomas S. Moffett, brothers. For many years prior to August 23, 1927, the firm was engaged in farming and dealing in cattle in Missouri, Kansas, and Oklahoma. John Moffett died testate August 23, 1927, and at that time, according to claimant, the value of the partnership property was about $650,000. John Moffett, in

his will executed February 21, 1921, named his brother, Thomas S., as executor, and provided that, in the event Thomas S. was unable to act, the Commerce Trust Company would be executor. Thomas S. was appointed by the Probate Court of Jackson County as executor of the John Moffett estate on August 29, 1927, and also proceeded, as the sole surviving partner, to administer the partnership estate. August 17, 1928, Helen Moffett, John's widow, commenced proceedings in the probate court to remove Thomas S. as executor of the John Moffett estate on the ground that the interests of the John Moffett estate and the Moffett Brothers estate were conflicting. November 28, 1928, Thomas S. was removed as executor of the John Moffett estate, and the Commerce Trust Company (Kansas City) was appointed administrator *de bonis non* of the estate. December 22, 1928, the trust company, proceeding under Section 86, Revised Statutes 1929 (Mo. Stat. Ann., sec. 86, p. 52), claims to have become administrator of Moffett Brothers estate in Missouri. It is contended by appellant that the trust company was not legally authorized to administer the Moffett Brothers estate, but, as stated, we shall consider only one question.

August 15, 1929, Thomas S. Moffett filed suit in the District Court of Harper County, Kansas, to partition some 8000 acres of land, in Kansas, belonging to the Moffett Brothers estate. Mrs. Helen Moffett, widow of John, and one of the defendants in the Kansas partition suit, in her answer, alleged that the Moffett Brothers estate was indebted to the John Moffett estate, and asked that an accounting be had before there was any partition. Represented by claimant, the Commerce Trust Company, as executor *de bonis non* of the John Moffett estate in Missouri, on June 9, 1930, asked and was granted leave to intervene in the Kansas partition suit. The petition to intervene was verified by claimant, and alleged, among other things, that the Moffett Brothers estate *was indebted* to the John Moffett estate in the sum of $91,375.18, and that the Kansas lands belonging to the partnership estate of Moffett Brothers was "not subject to partition until all of the obligations of said partnership have been fully satisfied."

July 23, 1930, the Commerce Trust Company, as executor *de bonis non of the John Moffett estate* in Missouri, and represented by claimant, having been granted leave, filed an intervening petition in the Kansas partition suit, which petition was verified by claimant, and, among other things, alleged "that *there is now due* to intervenor as executor *de bonis non* of the will and estate of John Moffett, deceased, a sum of money, which your intervenor is unable to ascertain; *that there is a disagreement and irreconcilable differences between the surviving partner and the estate of John Moffett, deceased, as to the amount due to said estate,* which makes it necessary for this court to require an accounting between the plaintiff (Thomas S. Moffett) as surviving partner, this intervenor, as executor, and the defendants herein who are heirs of said John Moffett, deceased, and further states that due to the many years of existence of said partnership and the complicated records that it will be impossible to adjust all of the differences and ascertain the rights and liabilities of all of the parties hereto in an action at law and that it will be necessary for a court of equity to take an accounting and determine the rights and liabilities of all of the parties hereto." (Italics ours.)

Thomas S. Moffett, plaintiff in the partition suit, resisted the accounting demands of Helen Moffett, and the Commerce Trust Company as executor of the John Moffett estate in Missouri, but was overruled by the trial court and appealed. The Supreme Court of Kansas sustained the ruling of the trial court, and held that there should be such "an accounting as prayed for by the defendant (Helen Moffett) and intervenor in order to determine the respective interests of the parties in the land sought to be partitioned." (Moffett *v.* Moffett et al., 131 Kan. 582, 292 Pac. 947, l. c. 950.)

The opinion was handed down by the Supreme Court of Kansas on November 8, 1930, and Thomas S. Moffett, plaintiff in that case, died testate December 22, 1930, and his widow, appellant here, was the sole beneficiary under his will and was named in the will as executrix and was so appointed by the Probate Court of Jackson County. January 5, 1931, Mrs. Grace Torrance Clark, a sister of appellant, was appointed, by the Probate Court of Wyandotte County,

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Kansas, as ancillary administratrix of the Thomas S. Moffett estate in Kansas, and on January 8, 1931, Mrs. Clark, by order of the Probate Court of Wyandotte County, Kansas, became administratrix of Moffett Brothers estate in Kansas.

February 14, 1931, the partition suit, on motion of Helen Moffett, and resisted by appellant and Mrs. Clark, was revived in the names (as plaintiffs) of appellant, as sole beneficiary under the will of her husband, Thomas S. Moffett, and Mrs. Clark, as ancillary administratrix of the Thomas S. Moffett estate in Kansas. There was no order of revival in the name of Mrs. Clark as ancillary administratrix of the Moffett Brothers estate in Kansas, but Mrs. Clark testified that as claimant was "prosecuting everything against the partnership" she endeavored "to protect the partnership." The partition suit, with its accounting feature, was tried in October, 1931. The Commerce Trust Company, in its dual capacity as executor *de bonis non* of the John Moffett estate in Missouri, and as administrator of the Moffett Brothers estate in Missouri, was represented by claimant. Mr. A. E. Watson, counsel for appellant in the present case, and counsel for her and Mrs. Clark in the partition-accounting suit, testified that *the principal contention* in the partition-accounting suit was whether or not Moffett Brothers estate was indebted to the John Moffett estate, and that appellant and Mrs. Clark, at the trial in Kansas, resisted this claim of indebtedness "to the best of their ability, and Mr. Howard, representing the Commerce Trust Company in its capacities, never interposed any objection to anything that took place in the trial of that case that would benefit the estate of John Moffett." And we might say that claimant does not contend that *the principal contention* in the partition-accounting suit was not as given by Mr. Watson.

The Kansas trial court, in the partition-accounting suit, found that the Moffett Brothers estate was indebted to the John Moffett estate in the sum of $143,829.96; that the Thomas S. Moffett estate was indebted to the Moffett Brothers estate in the sum of $27,399.25, and that the Moffett Brothers Cattle, Land & Lumber Company (an Oklahoma partnership in which John and Thomas S. were interested) was indebted to the Moffett Brothers estate in

the sum of $101,228.06, and this finding was affirmed by the Supreme Court of Kansas. (Clark et al. *v.* Moffett et al., 136 Kan. 711, 18 Pac. (2d) 555.) The question as to whether or not the Moffett Brothers estate was indebted to the John Moffett estate was a complicated one, and a fair notion of this complication appears in the Kansas Supreme Court opinion in the partition-accounting suit, as follows (18 Pac. (2d) l. c. 556):

"Does the evidence sustain the finding that Moffett Brothers was indebted to John Moffett? On this point the evidence may be summarized as follows: John Moffett and Thomas S. Moffett resided at Kansas City, Mo. They were equal partners in the firm of Moffett Brothers. When this partnership was formed is not definitely shown, but it had existed a long time, perhaps thirty years or more, when it was dissolved by the death of John Moffett. It was engaged in the ranching and live stock business, and owned and operated a number of farms and ranches, and had offices in the Livestock Exchange Building at Kansas City. John Moffett spent most of his time at the office, where they had bookkeepers and other clerical help. Thomas S. Moffett spent most of his time looking after the farms and ranches and the livestock thereon, going back and forth from the office to the various ranches. Each of them had property owned individually. Both of them were members of the partnership firm of Moffett Brothers Cattle, Land & Lumber Company, which was engaged in the livestock, land and lumber business in Oklahoma, the field work being looked after by the Oklahoma brothers, but the office business transacted at the Kansas City office. Both John and Thomas S. Moffett were members of a partnership known as Moffett Brothers & Andrews, which was also engaged in the live stock business. One or both of them were interested as members or otherwise in four other partnerships, namely, Andrews, Lewis & Moffett, Andrews & Lewis, J. C. Lewis & Co., and Andrews & Moffett. The books of all of these partnerships and of the personal business of John Moffett, and perhaps the personal business of Thomas S. Moffett, were kept in the one office at Kansas City and by the same office force. Collectively they transacted a large volume of business, amounting to many thousands of dollars each

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year. While notations or entries were made to identify the business of each of the partnerships or individuals, it was all entered in a common ledger which bore the names of 'Moffett Brothers & Andrews Ledger.' About 1924 they had a firm of accountants examine these books and open a separate set of books for the partnership of Moffett Brothers. Separate books were also opened for the partnership of Moffett Brothers Cattle, Land & Lumber Company. Separate books were opened for some, perhaps all, of the other partnerships, but that is not material here. The business of the partnership of Moffett Brothers thereafter was kept in the books of that firm until the death of John Moffett, and thereafter to the time of the trial of this action. These books were in court at the trial, and the entries in them, the testimony concerning some of those entries, and a summary of them prepared by accountants, known in this record as 'Commerce Trust Company Exhibit No. 8.' "

Mr. Watson testified that after the trial court made its decision in the Kansas partition-accounting suit he, as counsel for appellant and Mrs. Clark, asked claimant to file a motion for a new trial on behalf of the Commerce Trust Company as administrator of the Moffett Brothers estate and that claimant refused to do so; that the reason he made such request was that he was fearful that, unless the Commerce Trust Company, as administrator of the John Moffett estate in Missouri appealed from the judgment, the merits might not be for consideration on appeal.

Appellant in her statement says that claimant "in one of his pleadings" in the partition-accounting suit, alleged that Mrs. Clark, as administratrix of Moffett Brothers estate in Kansas "was without power to make a defense on behalf of said partnership estate" in that suit. Claimant devotes forty pages of his brief to what is called an "analysis" of appellants statement of the case, "and says that Mrs. Clark, as administratrix of the Moffett Brothers estate in Kansas, did appear for and represent said estate in the partition-accounting suit, and claimant goes on to say in this "analysis" that Mrs. Clark, as administratrix of Moffett Brothers partnership estate in Kansas "paid thousands of dollars of Moffett Brothers partnership estate money out to attor-

neys, Martin J. O'Donnell and A. E. Watson, for helping her in" the partition-accounting suit. Which means, as we read, that attorneys O'Donnell and Watson, and not claimant, resisted the claim of the John Moffett estate against the Moffett Brothers estate in the partition-accounting suit."

Appellant and Mrs. Clark sought review of the partition-accounting suit by certiorari, in the Supreme Court of the United States, and claimant and other counsel resisted, and the writ was denied. (Clark, Admx., et al. *v.* Moffett et al., 290 U. S. 642, 54 Sup. Ct. 61, 78 L. Ed. 558.)

Appellant brought suit in the United States District Court (Kansas) to enjoin the enforcement of the judgment against the Moffett Brothers estate in the partition-accounting suit, but was unsuccessful. (Moffett *v.* Robbins, 14 Fed. Supp. 602, and 81 Fed. (2d) 431.) Notwithstanding that the purpose of the Federal court case was to enjoin the payment of a judgment against claimant's client, the Moffett Brothers estate, claimant said that he "was not directly interested in that case." And notwithstanding that *the principal contention* in the partition-accounting suit was on the claim of the John Moffett estate against the Moffett Brothers estate, claimant admits that he represented both estates in that suit. And it appears that claimant, at the trial of the partition-accounting suit, presented the evidence that resulted in a judgment, against one of his clients, for $143,829.96. The picture can be better appreciated by visioning John and Thomas S. Moffett as living and adversaries in a lawsuit on the same claim of indebtedness, as here, and claimant representing both of them. In a supplemental brief on behalf of the Commerce Trust Company, filed by attorneys, Hiller and Bush, it is stated that claimant "was allowed a fee (the $11,500, we infer), for acting as attorney for Commerce Trust Company, administrator of the Moffett Brothers copartnership estate in handling the complicated and difficult legal questions involved in procuring an accounting and adjustment of the partnership affairs, so proper distribution could be made."

(1) There can be no question on the conflicting interests of the John Moffett estate and the Moffett Brothers estate

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in the partition-accounting suit, and the rule that counsel cannot lawfully represent conflicting interests in the courts of the land is as old as our system of jurisprudence. "This court has ever recognized and enforced the rule that it is the duty of an attorney to devote his skill and diligence to the interest of his client and has refused to permit him to act for the adverse party in the same suit, even though his motives were honest." (National Hollow Brake Beam Company *v.* Bakewell et al., 224 Mo. 203, l. c. 226, 123 S. W. 561.)

In MacDonald *v.* Wagner, 5 Mo. App. 56, l. c. 58, the court said: "An attorney cannot recover for legal services rendered by him both to plaintiff and defendant in the same suit. The plaintiff here discloses a case founded upon a cause of action which the law, from wise motives of public policy, forbids. The intentions of plaintiff were doubtless good; but a lawyer can under no conceivable circumstances recover for services rendered in the same suit to parties having opposing interests."

"Justice and ethics both require that no attorney be permitted to receive fees from adversaries in any cause." (Logan *v.* Logan et al., 97 Ind. App. 209, 180 N. E. 32, l. c. 34.) And, as stated in Sun Bldg. & Loan Assn. *v.* Rashkes, 119 N. J. Eq. 443, 183 Atl. 274, l. c. 277, "an attorney cannot act on behalf of two opposing parties; and even though he may act for two parties in matters which are uncontested, his conduct is open to the most careful scrutiny. He is obliged to exhibit the most perfect good faith. He cannot prejudice one client for the benefit of another. A scriptural passage which succinctly expresses the principle under consideration is found in Matt. VI, 24:33, as follows: 'No man can serve two masters; for either he will hate one, and love the other, or he will cling to one, and slight the other.'"

In Strong *v.* International Building, Loan & Investment Union et al., 183 Ill. 97, l. c. 101, 55 N. E. 675, is this: "Attorneys at law cannot thus accept employment from adverse litigants at the same time and in the same controversy. Nor does it matter that the intention and motives of the lawyers are honest, as we fully believe them to have been in the present instance. The rule is a rigid one, and designed not alone to prevent the dishonest practitioner from fraudulent

conduct, but as well to preclude the honest practitioner from putting himself in a position where he may be required to choose between conflicting duties, or be led to an attempt to reconcile conflicting interests rather than to enforce to their full extent the rights of the interest which he should alone represent."

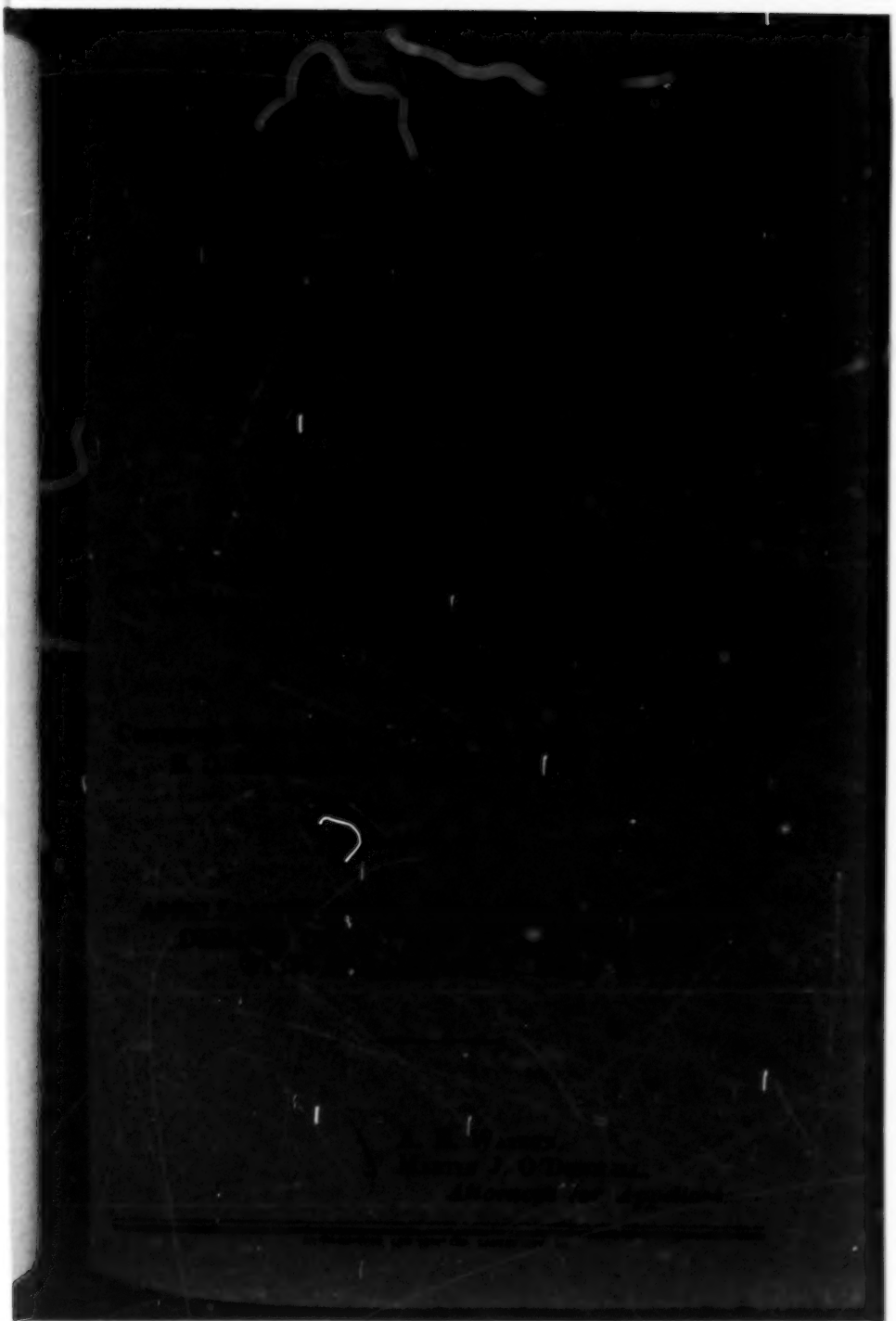
(2) The record shows that claimant has received $6000 as counsel for the Commerce Trust Company as executor *de bonis non* of the John Moffett estate, and the inference is that the greater part of the $6000 fee from the John Moffett estate was for services in the partition-accounting suit and related matters.

As we have stated above, there can be no question as to the conflict of interest, in the partition-accounting suit, between the John Moffett estate and the Moffett Brothers estate, and the rule, as we have seen, is that an attorney cannot receive pay from both sides where the respective interests are conflicting. (See also Rochester et al. *v.* Canterman et al. (Mo.), 49 S. W. (2d) 71; 7 C. J. S., sec. 167, p. 1024; 6 C. J., sec. 289, p. 722; 5 Am. Jur., sec. 64, p. 296; 2 R. C. L., secs. 51, 52, pp. 973, 974.)

Perhaps claimant rendered services for the Moffett Brothers estate of the value of $1300 when he was not representing conflicting interests That is not made clear, hence in the situation, we do not think that we should disturb the approval of the payment of the $1300.

The judgment should be reversed, and the cause remanded with directions to enter a judgment denying claimant any additional fee, but approving the payment of the $1300, and it is so ordered. Hyde and Dalton, CC., concur.

Per CURIAM: The foregoing opinion by Bradley, C., is adopted as the opinion of the court. All the judges concur.



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In the Supreme Court of the United States

LOUISE McGREW MOFFETT and LOUISE McGREW MOFFETT as Executrix of the Estate of Thomas S. Moffett, Deceased, *Appellants*,

vs.

COMMERCE TRUST COMPANY, a Corporation, HELEN WEEDE, B. C. HOWARD and WILLIAM H. KOPP, *Appellees*.

APPELLANTS' BRIEF OPPOSING MOTION TO DISMISS OR AFFIRM IN ACCORDANCE WITH PARAGRAPH 3, RULE 7.

No. 318.

STATEMENT.

(Figures in parentheses refer to pages of certified copy of the record.)

This brief is prepared in opposition to appellees' suggestions and motion to dismiss or affirm (950-1062), as provided in paragraph 3 of Rule 7.

The facts stated show that appellees' suggestions and motion are without merit.

Appellees' demurrers admit that the fifth amended petition as amended (154-323) shows that appellees, pursuant to an unlawful conspiracy to deprive appellants of the rights secured to them by Section 1 of the XIVth Amendment, and other alleged rights secured by other provisions of the Constitution and laws of the United States, and a Treaty of the United States, under color of the laws of Missouri and Kansas, in combination with persons exercising the power of both states, committed wrongful, overt acts between the year 1921 and this date, which violated appellants' said federal rights and authorized recovery under R. S. U. S., Sections 1979, 1980, 1981. The facts as to such unlawful violations are alleged in said fifth amended petition as amended (225), (285-294), (322).

The failure of the Supreme Court of Missouri to give *res judicata* effect, as required by the state law, to the premises as well as to the conclusion of its own decision reported in 345 Mo. 741-751, in favor of appellants and against appellees Commerce Trust Company, B. C. Howard and Helen Weede, as alleged (308-318), in violation of appellants' right to its application under the equal protection of the laws clause of the XIVth Amendment, is raised in the petition for rehearing in the State Supreme Court (829-852). The same question is also preserved in the assignment of error No. 2 in this Court (934). The act of the State Supreme Court, in denying appellants' motion to transfer the case to the court *en banc* is questioned as error at the first opportunity in assignment of error 37 (940). (*Saunders* v. *Shaw*, 244 U. S. 317, l. c. 320; *Brinkerhoff-Faris Trust & S. Co.*, 281 U. S. 673.)

The assignments of error in the state court are referred to in its opinion (820). All of the assignments of error in the state court (945-948) involved federal questions under the allegation in assignment XXII (948). Said assignment

XXII in the state court states that by the preceding assigned errors appellant was "deprived of the rights secured to her by Section 1 of the XIVth Amendment, United States Constitution." The opinion of the court points out (820) that the court considered and decided the questions so raised in said assignments of error thus (820):

> "Appellants claim error under twenty-two numbered assignments, some being mainly a repetition of others. We have considered all of these assignments, but see no useful purpose in discussing each one separately."

Assignment 2 in the state court (945) draws in question the validity of Section 948, R. S. Mo. 1939, because of repugnancy to Section 10 of Article I of the Constitution, providing that "No State shall * * * pass any bill of attainder." The state court's opinion shows that it held said section valid and not repugnant to said provision of the Constitution (826-827). Said error is assigned as 14, 15, 16 and 18 in this Court (936-937).

The failure of the trial court in its assignment division to grant appellants a hearing on the issues presented by the pleadings (after the amendment was made on December 30, 1944), in violation of Rule 29 of the court (402-406) and in assigning the case to Assignment Judge Ridge's own Trial Division 6 (424) without notice as required by the rules, and in rendering the penal judgment rendered in said Division 6 without evidence, trial or hearing, in violation of the provisions of Section 1 of the XIVth Amendment to the Constitution, is specifically assigned as error in assignment V in the state court (945). Said action is assigned as error in this Court as assignments 16 (936-937) and 18 (937).

The conflict of the partnership administration statutes with Section 10 of Article I of the Constitution prohibiting bills of pains and penalties, the Treaty with France of 1803 (290), the involuntary servitude provision of the XIIIth Amendment, and the privileges, immunities and due process provisions of the XIVth Amendment, are specifically assigned in assignment IX in the state court (945), and referred to in the opinion of said court (820) as considered and decided and assigned as error in assignments 3 to 8, inclusive (935).

Assignment XV (947) invoked the equal protection of the laws clause of the XIVth Amendment specified in assignment XXII (948) as against the action of the trial court and the action of the legislature (291-293) in giving effect to the 1911 statute providing for "Special Judges, Laws Missouri, 1911," contrary to the provisions of Section 34 of Article VI of the Missouri Constitution of 1875 providing that there shall be a probate court in every county, which "shall consist of one judge" (291). Said error is assigned in this Court as 25 (938).

Appellees claim, on page 88 of their statement (1037), that Sections 43, 47 and 48, Title 8, U. S. C., gave appellants no right to maintain the action and that the state court correctly so decided. This, of itself, is a federal question (*Lovell* v. *Griffin*, 303 U. S. 450). The basis for the application of said federal statutes, to-wit: Sections 1979, 1980 and 1981, U. S. R. S., was whether the overt acts, pursuant to the conspiracy, deprived appellants of the rights secured to them by the XIVth Amendment due process and other provisions of the United States Constitution. The opinion (827), in specifically deciding that the facts alleged and admitted by appellees that

"Appellants have not been denied due process"

was a specific decision denying appellants right to recover under said Civil Rights Acts, and holding that they were invalid or without application. And also a specific denial of appellants' right to recover because of the violation of appellants' rights under Article III of the Treaty with France of 1803 (290), and of all the provisions of the Federal Constitution referred to in the fifth amended petition as amended (827). Said error is assigned in various forms as 10, 11, 12 and 13 (935-936) in this Court.

The State Supreme Court held that the petition did not state a cause of action and thus decided that none of the violations of the rights, privileges and immunities violated by the overt acts, pursuant to the conspiracy and secured by the Federal Constitution, Laws and Treaty alleged in the pleading authorized appellants to recover and that appellants were not deprived the due process protection of the XIVth Amendment. The opinion states:

> " • • • we recognize the distinction between 'defect of parties' and 'misjoinder of parties,' although not listed in the statute, is a ground of demurrer because in that situation the petition *does not state a cause of action.*" (821.)
>
> "These allegations and many others show *that no joint cause of action is stated.* Such defect *appearing on the face of the petition,* under the old code, could be reached by demurrer. • • •" (823.)
>
> Judge Ridge sustained the demurrers on the sole ground of misjoinder of parties, but the demurrers also attacked the petition • • • *for failure to state a cause of action.* We think the reason assigned by the trial court is sufficient, but *his ruling can be sustained on the other grounds mentioned.*" (823-824.)
>
> "The pleadings ruled upon by Judge Ridge • • • but the complaint as to defect of parties and *failure to*

state a cause of action were clearly stated. Such could be determined from the face of the petition." (825.)

"Appellants have not been denied due process." (827.)

The opinion as above quoted destroys the contention of appellees on page 19 of their suggestions (968) that

"All that the Supreme Court of Missouri has decided, in the instant case, is that under the applicable law appellants had no right to maintain *jointly* the instant suit. The *trial court* sustained the demurrers *on the one ground of misjoinder of parties plaintiff.*"

* * * * * * *

"Consequently, there was no decision against the validity of Sections 1979, 1980 and 1981, U. S. R. S. (Secs. 43, 47 and 48, Title 8 U. S. C.) or against the right of either appellant to maintain an action thereunder."

Appellees, consequently, are thus making the same suggestions to this Court which are reflected in the finding of fact by the circuit court to the effect that "upon the record and suggestions of counsel for said defendants now appearing" (424), three petitions have been held insufficient on the ground of misjoinder of parties plaintiff, whereas the general orders purporting to sustain same (60-61, 152-153) are general orders purporting to sustain the demurrers on every ground alleged. And the opinion of Judge Wright specifically points out that he held that the petition failed to state a cause of action under the federal statutes, saying:

(See Exhibit "A" hereto attached.)

"Plaintiff contends that the conspiracy alleged violates the Federal statutes giving a cause of action

for the deprivation of any rights, privileges or immunities secured by the Constitution and laws, and contends that this issue was not in the Kansas cases. I am persuaded that plaintiff's petition does not state a cause of action under the statutes relied upon, and I am further convinced that even though the acts alleged would constitute a cause of action under the Federal statutes, yet the overt acts or matters and things about which plaintiff complains have been tried and determined and cannot be now relitigated as a basis of a cause of action."

While the decision of the circuit court through Judge Ridge is an evident attempt to keep federal questions out of the case, based upon "suggestions of counsel for said defendants now appearing," yet the opinion of the circuit court, through Judge Wright, specifically shows that his decision in the trial court was against the validity of said sections when he held that said petition did not state a cause of action. And whether the decision was against the validity of said sections, or was a failure to apply said sections correctly, said facts show that the *trial court* did decide said federal questions arising under said Civil Rights Acts, the "suggestions of counsel for defendants" to the contrary notwithstanding. And when the State Supreme Court declared that the petition did not state a cause of action, then, under the facts alleged, said decision was a decision holding them invalid, under *United States* v. *Sutton,* 215 U. S. 291, l. c. 294, and a decision affirming the decision of the trial court which had in Judge Wright's division specifically decided the federal question that appellants could not recover under the federal statutes, which decision was implicit in the judgment of affirmance in the State Supreme Court.

The Circuit Court on December 30th, 1944, erred in sustaining the alleged demurrers because the papers so entitled in Judge Terte's court were mere collateral attacks on the orders of Judge Buzard (47, 51) overruling motions to strike for the same alleged cause of misjoinder of parties plaintiff on May 27, 1942, and on the order of August 10, 1942 (51), of Judge Buzard overruling the demurrer of respondent Kopp.

In *Scott* v. *Rees*, 300 Mo. 123, l. c. 132, it is said:

> "The legal character of a pleading is to be determined by its substance, not by its name,"

citing *State ex rel.* v. *Ellison*, 266 Mo. 423. The latter case was by the court *en banc*, in which case defendant filed a motion to strike. Said motion was sustained, and later defendants filed a motion praying that the cause be dismissed as to them. No motion for a new trial was filed. The Court of Appeals held that its inquiry could not be extended to any matter of exception because no motion for a new trial was filed. The Court of Appeals also held that the motion to dismiss could not be treated as the legal equivalent of a demurrer, and declined to review the ruling of the trial court on the motion to dismiss. In quashing the opinion of the Court of Appeals the court said, l. c. 429:

> "The court announces the general and uniformly accepted doctrine that the legal character of a pleading is to be determined by its substance, and not name, and that motion to strike out or to dismiss may fill the office of a demurrer, and be so treated, where it is, to all intents and purposes, a demurrer, and is dispositive of the whole case as a matter of law."

Since it was the duty of the court to examine the record to ascertain whether or not three demurrers had been

lawfully sustained, then of course Judge Ridge was charged with that duty and notice of that which was apparent on the record of the assignment division at the time he sustained the demurrer to the fifth amended petition and made his finding of fact in said assignment division. In fact, the only record which he could notice in the assignment division was that of Judge Buzard, with reference to rulings on demurrers, because no demurrer had been ruled on in the assignment division by any judge excepting Judge Buzard. On the contrary, the record in the assignment division disclosed that Mr. Kopp's demurrer (so named) had been overruled, and excepted to by all respondents (51); and that the motions to strike of the other respondents, on the ground that there was a misjoinder of parties plaintiff, had been overruled and such ruling was likewise jointly excepted to by all the respondents.

The finding by Judge Ridge that Judges Terte, Wright and Ridge had sustained the alleged demurrers upon the ground of misjoinder of parties plaintiff would seem to be conclusive of the proposition that the orders of Judge Buzard overruling the motions to strike based on that ground were overrulings of what, in legal contemplation, were demurrers on that ground, if such ground could be considered as a basis of demurrer. Judge Ridge wholly ignored said rulings of Judge Buzard, which rulings in and of themselves prevented contrary rulings by Judge Terte on the same first amended petition upon the same grounds and likewise prevented Judge Ridge from counting the order of Judge Terte in arriving at the conclusion that three demurrers had been sustained.

The law in Missouri, and in the State and Federal courts as declared by three Justices of the Supreme Court of the United States prevented any assignment judge in

the same case and in the same court from making any ruling contrary to those made by Judge Buzard, since Judge Buzard's rulings were never set aside nor modified. And said respondents did not stand on said rulings but sought to have Judge Terte exercise supervisory control and appellate jurisdiction over the rulings of Judge Buzard.

The question here presented has been discussed in the leading case of *Commercial Union of America* v. *Anglo-South American Bank*, 10 Fed. (2d) 937 (C. C. A. 2). In that case a motion to dismiss an action was filed in the District Court before one judge, which motion was overruled. Thereafter a similar motion was presented to another district judge as to the same petition, as here, and the motion was sustained and the action was dismissed. On appeal the only question determined was, what should the appellate court do in the case, the court saying, l. c. 938:

> "It is contended by the plaintiff that the order first made, sustaining the sufficiency of the complaint, rendered the question of *res judicata* as between the parties, and was the law of the case, binding upon the other judges of the court."

The court then referred to an opinion of Justice Miller of this Court in *Appleton* v. *Smith*, 1 Fed. Cas. 1075, Fed. Cas. No. 498, while sitting as a circuit justice wherein he said, l. c. 938:

> "Where, as in the present case, the motion is made on the same grounds, and with no new state of pleadings or facts, it is nothing more than an appeal from one judge of the same court to another, and though it is my province in the Supreme Court to hear and determine such appeals, I have in this court no such

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prerogative. The district judge would have the same right to review my judgments and orders here as I would have in regard to his. It would be in the highest degree indelicate for one judge of the same court thus to review and set aside the action of his associate in his absence, and might lead to unseemly struggles to obtain a hearing before one judge in preference to the other."

In *Cole Silver Mining Co.* v. *Virginia & Gold Hill Water Co.*, 6 Fed. Cas. 72, Mr. Justice Field of this Court, sitting in the Circuit Court, said, l. c. 939:

"The Circuit Judge possesses, as already stated, equal authority with myself in the circuit and it would lead to unseemly conflicts, if the rulings of one judge, upon a question of law, should be disregarded, or be open to review by the other judge in the same case."

In *Reynolds* v. *Iron Silver Mining Co.*, 33 F. 354, Justice Brewer of this Court, sitting in the Circuit Court of Colorado, cited with approval what was said by Justice Miller in *Appleton* v. *Smith, supra,* going on to say, l. c. 939:

"You all know, at least those who have been familiar with the jurisprudence of the State of New York, how many unseemly struggles there have been, as Justice Miller refers to, to get a case now before one judge, and then before another. Under their peculiar system, you get an order before one judge; the beaten party goes to another judge, gets an order staying proceedings, and sets down a motion before a third to vacate the order, and one never knows when the litigation is at an end, or where it is to continue; whereas, if it is all continued before the same judge from the commencement to the close, there is a consistency in the rulings, if nothing else; and I think that the orderly administration of justice

requires, and justice itself will in the long run and the general average be best secured, if litigation commenced before one judge continues before him until it shall be taken to an appellate tribunal."

The court in *Commercial Union* v. *Anglo South American Bank*, (10 Fed. (2d) *supra*) concluded by saying, l. c. 941:

"It appears, therefore, that in dismissing the complaint he thought the decision of this court in the Old Colony Trust Co. Case, and handed down after Judge Mack had made the original order sustaining the sufficiency of the complaint, was erroneous in law, ought to be disregarded by him, and required the dismissal of the action. In so holding we think he made a serious mistake, quite irrespective of whether or not the Old Colony Trust Co. Case was correctly construed by him. The counsel for the plaintiff in error insists that that case is plainly distinguishable from this in its facts, and is not at all governed by it. We shall not pass upon that question at this time, but content ourselves with holding that the decision made by Judge Mack was the law of the case as established in the District Court, and should have been so treated by any other judge sitting in the same case in that court. Judges of co-ordinate jurisdiction, sitting in the same court and in the same case, should not overrule the decisions of each other.

For that reason and that reason only, the judgment is reversed, and the District Court is directed to reinstate the action and grant the motion to amend the complaint."

The law of Missouri is the same as the law above stated by three Justices of the Supreme Court of the United States, and others:

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In *State ex rel.* v. *Buckner,* 207 Mo. App. 48, l. c. 53, the applicable law is stated:

> "However, whether a motion in a given case may be regarded as *res adjudicata* or otherwise, *the first decision upon the same is considered conclusive and is a bar to a similar maintenance of substantially the same motion upon substantially similar facts,* and may not be renewed before either the same or a different judge, unless leave of court is first obtained to present the same matter again. (14 Ency. of Pleadings and Practice, 178-181, 28 Cyc. 18, 19.)"

In *Bennett's Adm'r* v. *Russell's Adm'r,* 39 Mo. 152, the syllabus states the rule that:

> "The action of the court refusing to set aside an order previously made upon motion of a party alleging that he had not appeared to, nor had notice of the motion upon which the order was made, concludes the party."

In *State ex rel. Allen* v. *Buckner,* 226 Mo. App. 807, it was held that an order for temporary alimony could not even be stayed or interfered with by another judge sitting in another division.

The court was without right to consider the separate demurrers so long as the orders, made May 27 and August 10, 1942 (47, 51), overruling the pleading that the first amended petition misjoined parties plaintiff, remained on the record. And the filing of the alleged demurrers to the first amended petition beginning on September 2, 1942 (51), after said orders were entered, and their being sustained many terms after the May term, 1942, were void proceedings. The principle is well stated in 42 C. J. 519, Sec. 177, citing Missouri authority:

> "Notwithstanding the decision of a motion may not operate strictly as *res judicata*, it will ordinarily be considered as conclusive to the extent of barring the renewal of the same or a similar motion, once denied on the merits, based on the same or similar facts either before the same or before a different judge, unless leave of court is obtained to present the same matter again."

In *Ruggles* v. *International Ass'n Iron Workers*, 331 Mo. 20, it is said, l. c. 26:

> "When a pleading, although denominated a motion, 'performs the office of a demurrer and disposes of a case, it may be treated as a demurrer and therefore a part of the record proper of which we may take cognizance, although it is not contained in the bill of exceptions'."

The first pleading to the first amended petition was the properly entitled separate demurrer of William H. Kopp (44-45) alleging that said petition "does not state facts sufficient to constitute a cause of action against this defendant." Commerce Trust Company also filed a document which is labelled "Separate Motion of Defendant Commerce Trust Company to Strike Out Plaintiff's Petition" (45-47).

The main ground therefore is:

> "(b) The respective claimed or alleged rights, demands or causes of action which it is asserted in said first amended petition inure to the said Louise McGrew Moffett in her said respective individual and representative capacities, as will appear from the allegations of said first amended petition, are separate, distinct and inconsistent and cannot in any event be asserted jointly and concurrently in this

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action by the said Louise McGrew Moffett in her said respective capacities as an individual and as Executrix of the estate of Thomas S. Moffett, deceased."

Said motion was dispositive of the whole case.

A motion filed by Mrs. Weede to strike (46) alleged that:

> "As appears especially in the caption and in the first paragraph of the first amended petition herein, and also in the entire first amended petition, plaintiff Louise McGrew Moffett improperly attempts to unite and join an alleged claim which plaintiff alleges is due her personally with an alleged claim plaintiff also asserts is due her as executrix of the estate of Thomas S. Moffett, deceased."

Appellee Howard (44) asked that the first amended petition be stricken because:

> "• • • said first amended petition makes Louise McGrew Moffett and Louise McGrew Moffett as executrix of the estate of Thomas S. Moffett, deceased, joint plaintiff in said action; • • •"

Said pleadings so labelled separate motions, were overruled on May 27, 1942 (47), and the pleading of Kopp, entitled demurrer, was overruled on August 10, 1942 (51).

The said alleged grounds set forth in the motions of the Trust Company, Howard and Weede, with reference to alleged misjoinder, are not properly grounds of demurrer included in Section 922, R. S. Mo. 1939. Consequently, an alleged demurrer, including an alleged ground of misjoinder of parties plaintiff, does not give, and did not give, a Circuit Court jurisdiction to dispose of appellant's case on an alleged ground which the statute did not

authorize. And especially is this true for the reason that in this case said respondents presented the concrete question, later submitted to the court in alleged demurrers, of misjoinder of parties plaintiff; and Judge Buzard, after due consideration, overruled the respondents' contentions on said issue.

The orders overruling said motions (47), as well as the order overruling Kopp's demurrer (51), were never set aside. Consequently, the succeeding assignment judges were without jurisdiction to dispose of the case on the same identical ground.

Commerce Trust Company, on June 16, 1942, filed a motion (47-50) praying the court to require plaintiff to conform to Sections 916 and 917, R. S. Mo. 1939, in which it alleged that if plaintiff complied with said Sections such compliance would so affect said first amended petition that

> "• • • said first amended petition would be subject to attack by demurrer, because the same, contrary to law, would set forth • • • improperly joined parties plaintiff • • • same also would be subject to demurrer for failure of said first amended petition to state sufficient facts to constitute a cause or causes of action, and on other grounds." (49-50.)

Said motion, after due consideration, was overruled by Judge Buzard on August 10, 1942 (51).

It thus appears that respondent Commerce Trust Company, for itself and the other respondents, admitted that the joinder of appellant in both capacities did not render the petition demurrable, and presented same to one of the circuit judges who passed on said question and, after full consideration, overruled the appellees' contention on

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the issue thus tendered by the Commerce Trust Company, and said ruling has never been set aside.

Graves v. *Dakessian*, 132 S. W. (2d) 972, points out that the motions before Judge Buzard, in this record (44-47, 47-51), are before the Court for consideration if, as respondents successfully contended, misjoinder of parties plaintiff can be raised by demurrer, by saying, l. c. 974:

> "There is an exception in those cases where a motion serves the office of a demurrer. In such case the motion is a part of the record so that a ruling thereon may be reviewed in the absence of a bill of exceptions."

The record entry shows not only that the order overruling the separate motions of respondents Weede, Commerce Trust Company and Howard to strike plaintiff's amended petition did not indicate that the court granted leave to review its motions in the same or any other form, but on the contrary, it says the following: "to which ruling of the court said defendants except. Said defendants are given 20 days to plead herein" (47). Thus it appears that Judge Buzard's ruling on said motions was final. And also that his order overruling the separate demurrer of respondent Kopp (51) was in like condition, for, instead of having the order grant any leave to review the same question, the respondents jointly excepted to the ruling. It would seem that these orders were final, and, of course, Judge Terte was without power at the May term, 1943, to grant a rehearing of the same matter heard by Judge Buzard when Judge Buzard's orders were made at the May, 1942, term.

Only the assignment judge who decided the motion when first made can vacate an order made on the particular

motions or demurrers. (*Chadeloid Chemical Co.* v. *H. B. Chalmers Co.*, 242 Fed. 71; *Kenny* v. *Kelleher*, 63 Cal. 442; *United Drug Co.* v. *Cordley*, 239 Mass. 334; *Carlisle* v. *Barnes*, 183 N. Y. 272).

> "Running around from one justice to another, who may be thought to entertain a more favorable view of the situation presented, is a practice which courts are not inclined to favor." (*Kalichman* v. *Nadler*, 34 Misc. 809, 810, 68 NYS 396. See also *American Hosiery Co.* v. *Himler*, 78 Misc. 32, 34, 137 NYS 702.)

> "Where a motion has been decided it should not be reviewed before another justice in another guise, but in reality to vacate, reverse and annul the prior decision." (*Elias* v. *Coleman*, 89 Misc. 289, 290, 153 NYS 573.)

The fifth amended petition as amended raises the objection that the rules of the Circuit Court of Jackson County, Missouri, purporting to authorize a succeeding assignment judge to make up issues was in conflict with the provision of Section 10 of Article II of the Constitution requiring that right and justice be administered without delay, and that for said reason Rule 18 (296-297), purporting to permit Judge Terte to finish making up the issues which Judge Buzard had spent three terms trying to make up, was void because in conflict with the above section.

Appellants were entitled to be heard with reference to the foregoing questions of fact and law by Judge Ridge before he made his finding of fact and rendered the judgment of dismissal, penalty and forfeiture. They were also entitled to call Judge Ridge's attention to the fact that the fifth amended petition as amended was not demurrable, not only because Section 922 did not authorize a demurrer

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on said ground, but also on the ground that under Section
79 ~~1379~~, R. S. U. S., and the statutes of Missouri, Sections 856, 857 and 858, R. S. Mo. 1939, appellants were entitled to institute and maintain the action, because it accrued in Kansas and accrued under the Federal civil rights acts and in the Federal Courts, and that the state court was bound to give effect to the supreme law on the questions presented, and that the petition stated a cause of action, and was not demurrable on any ground. And that, in any event, appellees had lost any right to any benefit from the old code, and appellants were entitled to the benefit of the new code effective the following court day, under the provisions of the XIVth Amendment. The denial by Judge Ridge of that right and its affirmance by the State Supreme Court in itself violated appellants' right to a hearing under the XIVth Amendment and necessitates a reversal, without any reference to any other federal question in the case.

The foregoing statement is made in connection with and as part of the jurisdictional statement (890-923) and assignments of error (934-940) on file in this Court and cause which are made part hereof.

Due to the representation of appellees made to this Court that neither the trial court nor the State Supreme Court had decided any federal question, we attach hereto as Exhibit "A" the opinion in the case delivered by Judge Emory H. Wright of the circuit court, with his letter of transmittal to counsel.

As we understand paragraph 1 of Rule 12, said opinion being an earlier opinion in the same case should have been appended to the jurisdictional statement. And now, in view of appellees' contention concerning the decision of federal questions by trial and Supreme Court, we append said opinion hereto.

Exhibit "A."

EMORY H. WRIGHT
Judge of the Circuit Court
Division No. 1
Kansas City, Mo.

May 9, 1944.

Mr. Martin J. O'Donnell,
Mr. A. E. Watson,
Attorneys at Law,
1232 Dierks Bldg.,
Kansas City, Missouri.
Judge James E. Goodrich,
Attorney at Law,
218 Commerce Bldg.,
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Mr. John T. Harding,
Attorney at Law,
831 Scarritt Bldg.,
Kansas City, Mo.
Mr. William D. Bush,
Attorney at Law,
831 Scarritt Bldg.,
Kansas City, Mo.
and
Mr. Glen A. Wisdom,
Attorney at Law,
519 Commerce Bldg.,
Kansas City, Mo.

(Re: Moffett v. Commerce Trust Co., et al. No. 479103.)

Gentlemen:

I am today sustaining demurrers filed by defendants in the above-entitled cause, and enclosing memoranda.

Very truly yours,

E. H. WRIGHT.

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In the Circuit Court of Jackson County, Missouri, at Kansas City.

May Term, 1944. Division One.

LOUISE MCGREW MOFFETT and LOUISE MCGREW MOFFETT as Executrix of the Estate of Thomas S. Moffett, deceased, *Plaintiffs*,

vs. No. 479103.

COMMERCE TRUST COMPANY, a Corporation, HELEN WEEDE, ORLIN A. WEEDE, B. C. HOWARD, WILLIAM H. KOPP and R. E. COPMAN, *Defendants*.

This matter is presented upon the Demurrers filed by the several defendants to plaintiff's Third Amended Petition. The ardor with which the Demurrers were presented by able lawyers on the one side and defended against on the other, causes me to approach a decision with some trepidation. This because it is hardly conceivable that such a vigorous and earnest presentation could be made by men learned in the law if the contention on either side was wholly without merit.

It has been my practice generally, where a case is presented on brief, to indicate by means of a short memoranda my theory of the points presented. A discussion of all the points presented by brief in this case would extend this memoranda beyond any possible advantage to the parties concerned. I shall, therefore, limit my memoranda to a general statement touching the decisive points briefed.

I.

The question as to what extent the Court may consider the Kansas state and Federal decisions, in passing upon the Demurrers, presents itself at the outset. In other words, does plaintiff's petition plead the decisions of the Kansas and Federal courts sufficiently to require this Court to take judicial notice of the law of the cases referred to in plaintiff's petition.

It is my view that in so far as the plaintiff's petition relies upon the Kansas cases as a basis of her cause of action they should be considered by the Court as the law of the case for the purpose of passing upon the Demurrers.

II.

It is urged that the Missouri statute which authorizes the election of a member of the Bar to act as probate judge is unconstitutional and void; hence, the order made by Sam B. Strother, appointing the Commerce Trust Company as administrator of the Moffett Brothers partnership estate is a nullity. On this point I have concluded that the statute as passed was not an attempt to reorganize or change a constitutional court, but was merely an attempt to provide for the appointment of someone to act as judge in the absence of the regular judge of a court already established, and that if the legislature had no power to enact the statute, the individuals elected and acting under the statute were *de facto* officers whose acts cannot be collaterally attacked. I think the Supreme Court of Kansas correctly declared the law on this point.

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III.

Defendants in argument in support of their demurrers urge that the facts set out in plaintiff's Petition have been tried and determined by the state and Federal courts of Kansas, and that the issues thus raised are *res adjudicata*.

On this point it is my conclusion that every act alleged in plaintiff's Petition as a basis of her cause of action, which was litigated or which could have been litigated in the Kansas cases, is *res adjudicata*, and cannot be a basis of a cause of action while the Kansas judgments stand unimpaired. This applies to practically all of the plaintiff's allegations of overt acts alleged to be in pursuance to the alleged conspiracy.

Plaintiff contends that the conspiracy alleged violates the Federal statutes giving a cause of action for the deprivation of any rights, privileges or immunities secured by the Constitution and laws, and contends that this issue was not in the Kansas cases. I am persuaded that plaintiff's Petition does not state a cause of action under the statutes relied upon, and I am further convinced that even though the acts alleged would constitute a cause of action under the Federal statutes, yet the overt acts or matters and things about which plaintiff complains have been tried and determined and cannot now be re-litigated as a basis of a cause of action.

IV.

Plaintiff asserts that whatever effect the Kansas cases may have had upon the question of *res adjudicata* has been set aside and superseded by the decision of the Supreme Court of Missouri, in the Howard case. To me it is apparent that the Howard case has decided one issue, that being the right of B. C. Howard to collect an attorney's

fee for services rendered. The jurisdiction of the Circuit Court and the Supreme Court, in passing upon the Howard case, was circumscribed by the jurisdiction of the Probate Court in that particular proceeding. The appellate jurisdiction being derivative can be no broader than the jurisdiction of the Probate Court.

Commissioner Bohling gives apt expression to the general rule in *Re Miller Estate*, 162 S. W. (2d), l. c. 810, in which he says:

> "The circuit court only acquires jurisdiction over the matter litigated and fought out in the probate court from which the appeal is taken."

It would appear then that no decision of the Supreme Court in such a proceeding could extend or limit the authority or binding effect of the Kansas judgments.

The mere fact that dual representation prevents an attorney from enforcing the collection of his fee does not necessarily in all cases mean that a judgment in a case in which there was dual representation would be void, as illustrated by the decisions of the Kansas Courts.

In *Moffett* v. *Mofffett*, 131 Kansas 588, the court observes:

> "Appellant contends that the Commerce Trust Company is intervening in two capacities which are in conflict, but we think there is no such conflict as would make it difficult for the trial court to ascertain and adjudicate the respective rights of the parties."

And in *Moffett* v. *Robbins*, 81 Fed. (2d), l. c. 437, the court said:

> "The mere allegation that there was no adversary trial is a conclusion which the record affirmatively disproves."

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To me it is clear that the Missouri Supreme Court did not attempt to say what effect the Howard fee case would have upon the Kansas judgments. Further, it is apparent that the Kansas courts knew of the dual representation and refused to disturb the judgments on that account.

V.

On the question of misjoinder of parties plaintiff, I am inclined to the view that *Neiderberg* v. *Golluber*, 162 S. W. (2d) 592, and *Rockwood* v. *Crown Laundry Company*, 178 S. W. (2d) 440, state the general rule for the joinder of a plaintiff personally and in a representative capacity in a suit at law. This being a suit at law, I am of the opinion that the foregoing cases are decisive of the right of the plaintiff in this case to join a personal claim and a claim as administratrix.

In keeping with the foregoing views, I am entering an order sustaining the separate Demurrers of the defendants named in the title hereof.

E. H. WRIGHT.

This Court has never permitted the Missouri supreme court to construe a federal law so as to prevent its application in the way Congress intended (Pryor v. Williams, 254 U.S. 43), nor any other State (C.& O. Ry. Co. v. Kuhn, 284 U.S.44).

Nor will it permit a state statute to be applied by a federal court to cut down federal rights (Holmberg v. Armbrecht, 90 Law Ed. 590).

Section 43 Title 8 U.S.C. created rights which the State could neither cut down nor destroy.

ARGUMENT.

A.

Appellees quote from the opinion of the Supreme Court of Missouri herein and have attached four other opinions, all of which are alleged to be invalid by appellants, whereas, by so doing, appellees beg the question. And so we call attention to the fact that an opinion or judgment attacked cannot be set up as a bar to the attack under the authorities:

In Broom's Legal Maxims, 8th Ed., l. c. 133:

> "*Non potest adduci exceptio ejusdem rei cujus petitur dissolutio* (Hac. Max., reg. 2).—A matter, the validity of which is at issue in legal proceedings, cannot be set up as a bar thereto."

In discussing the maxim Broom said:

> "Where the legality of some proceeding is the matter in dispute between two parties, he who maintains its legality, and seeks to take advantage of it, cannot rely upon the proceeding itself, as a bar to the adverse party. It is obvious that to do so would involve the logical fallacy of *petitio principii*, and would in many cases preclude all redress to an aggrieved party."

In *Strother* v. *Hutchinson*, 4 Bing. 83, 89, 91, 33 E. C. L. 283, l. c. 287, Chief Justice Tyndal said, in a case before the court by writ of false judgment, that the false judgment itself could not be set up as a bar to the relief sought, in these words:

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"But that is setting up as a defense, the thing itself which is of the substance of complaint; a course which is prohibited by the maxim, *'Non potest adduci exceptio ejusdem rei cujus petitur dissolutio.'* "

Coltman, J., in the same case, l. c. 288:

"And as to the argument that upon a record of nonsuit, the plaintiff cannot be supposed to have been present to tender the bill of exceptions, it is answered by the maxim, *non potest adduci exceptio ejusdem rei cujus petitur dissolutio.*"

Lirette v. *Lirette*, 176 La. 367, l. c. 370, 145 So. 773:

"The defendants pleaded, first, the exception of misjoinder of parties defendant; second, *res adjudicata;* and third, no cause of action. The district judge sustained the plea of *res adjudicata*, and dismissed the plaintiff's suit. They have appealed from the decision.

"Inasmuch as there is no other judgment referred to in the record, we assume that the plea of *res adjudicata* was founded upon either one or both of the judgments which the plaintiffs are attacking. In a suit to annul or reform a judgment, a plea of *res adjudicata* cannot be based upon the judgment which is sought to be annulled or reformed. *Edwards* v. *Edwards*, 29 La. Ann. 597; *Holbrook* v. *Holbrook*, 32 La. Ann. 13; *Heroman* v. *Louisiana Institute*, 34 La Ann. 805; *Anderson* v. *Benham*, 40 La Ann. 336, 4 So. 454; *Lazarus* v. *McGuirk*, 42 La. Ann. 194, 8 So. 253; *Succession of Williams*, 168 La. 1, 121 So. 171."

In Black on Judgments, Sec. 321:

"• • • in an action to set aside the judgment on the ground of fraud, neither the judgment sought to

be vacated, nor an order to set aside a default and permit an answer in that case, can be set up as a bar to the action."

In 34 C. J. 481 it is said:

> "The judgment attacked cannot be pleaded as a bar or as *res adjudicata.*" *States* v. *Cromwell,* 14 N. E. 448 (N. Y.).

In *Easton* v. *Russell & Collier,* 3 Mo. 379, it is said, Syl. 1:

> "A former recovery pleaded in bar to an appeal for relief against a judgment at law alleged to have been obtained by fraud will not avail the defendant."

Appellees admit by their demurrers facts showing the invalidity of the Kansas judgments.

Appellees, in violation of the rules, have loaded the abstract with "EXTRACTS" from the 3-volume record in the Howard fee case, consisting of evidence largely offered by them with reference to the Kansas judgments rendered by the Kansas judge, admitted by them to be corrupt, shown at pages 531 to 803 of the record.

The three printed and one typewritten opinions and specifications (1051-1062) are of no aid to the court, by reason of the application of the above principle. And two of these opinions are opinions wherein no appellee was a party in the suits wherein they were rendered, and hence, they might as appropriately have attached Cervantes account of the windmills or Gulliver's Travels to their suggestions.

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B.

In "War Powers Under the Constitution," 42 A. B. A. Rep. 232, the former Chief Justice Hughes quotes from an unpublished opinion by Abraham Lincoln as to the right of a State to write an exception into the Constitution which is not in it with reference to its power to pass a conscription act. Said Mr. Lincoln:

> "The power is given fully, completely, unconditionally. It is not a power to raise armies *if state authorities consent;* nor if the men to compose the armies are entirely willing; but it is a power to raise and support armies given to Congress by the Constitution without an 'if'."

And so the Constitutional command as to the supreme law does not condition the supremacy of that law on an "if" that the state judges consent; nor if the parties are willing. But of its own force the supreme law is made supreme by the Constitution, without an "if." And then, to preclude all possibility of an "if," such "if" is excluded by the provision that, as to the supreme law—

> "• • • the judges in every State shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding."

To enforce that supreme law (or if possible), make said supreme law more supreme, the Congress enacted the Civil Rights Act, of which we reproduce Section 1979 (Section 43, Title 8, U. S. C. A.):

> "Sec. 43. Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other

> person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. R. S., Sec. 1979."

The provision as to the supreme law operates on said Section 1979, and as to this case makes it the supreme law of the State of Missouri, and of all the States. And its enforcement does not depend upon the proposition that it is enforceable if the State authorities consent, nor if the parties are willing to have it enforced; but, of its own force, and under the constitutional provision, said section is supreme in this case, without an "if." And all possibility of its being made non-enforceable by an "if" is excluded by the provision that as to said statute in this case:

> "* * * the judges in every State shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding."

The word "party" appearing in said statute means one or more. For instance, in Section 71, Title 28, U. S. C. A., the word "party" as used in said act of Congress means all who are plaintiffs or defendants jointly on one side or the other. (*Mutual Life Ins. Co.* v. *Champlain*, 21 Fed. 85, 90.) "Party" has been held to mean all parties to one side collectively. *Peters* v. *Banta*, 120 Ind. 416, 22 N. E. 195; *Leavell* v. *State*, 43 N. E. 68, 16 Ind. App. 72; *Rupp* v. *Swineford*, 40 Wis. 28; *Cook* v. *Cook*, 41 Md. 362.

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It would seem that Section 652 in Art. 2, Chap. 4, under the heading "Construction of Statutes," required the Missouri state court, if its authority is to be measured

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by the standard set by the appellees, to read the words "shall be liable to the party injured" in R. S. 1979 to include more than one party, and at least to include a single party in more than one capacity. Said section is as follows:

> "Sec. 652. When any subject-matter, party or person is described or referred to by words importing the singular number or the masculine gender, several matters and persons, and females as well as males, and bodies corporate as well as individuals, shall be deemed to be included."

See also Section 1 Title 1 U.S.C.

The word "any" in the phrase "any citizen of the United States or other person" in R. S. ~~1997~~ 1979 did not restrict the citizens of the United States, or other persons, who might be injured to one, under the decision of the Supreme Court of Missouri in *State* v. *Lumber Company*, 321 Mo. 461, construing Section 652. In that case the court said, l. c. 498-499:

> "The word 'any' is not an unyielding term, but one which readily yields to the legislative intent as reflected by the context of the act. And when the context so indicates, the word may be construed to mean 'one or more,' 'several,' 'some' or 'an indefinite number,' etc. (1 Bouvier's Law Dictionary, p. 205, title 'any'; 1 Century Dictionary, p. 253, title 'any'; *Platt* v. *City of Payette*, (Idaho) 114 Pac. 25; *West Chicago Park Commissioners* v. *McMullen*, 134 Ill. 170, l. c. 179-180; *Glen Alden Coal Co.* v. *Scranton*, 282 a. St. 45, l. c. 48; *Pioneer Construction Co.* v. *State Bank*, (Okla.) 158 Pac. 894; *Klotz* v. *Bank*, (Ind.) 134 N. E. 220, l. c. 222.)
>
> 'Furthermore, the applicatory rule of construction in force in Missouri would seem to leave no room for contention. We are admonished by statute to so construe statutory words importing the singular number

> as to include the plural (several) 'unless it be otherwise specifically provided or unless there be something in the subject or context repugnant to such construction'."

If, as appellees contend, the Missouri courts were authorized to construe Section 43, since it is a statute and regarded by this Court as a statute of the State of Missouri, as pointed out in *Hauenstein* v. *Lynham*, 100 U. S. 483, l. c. 490:

> "It must always be borne in mind that the Constitution, laws and treaties of the United States are as much a part of the law of every State as its own local laws and Constitution. This is a fundamental principle in our system of complex national polity."

It was therefore the duty of the state court to construe the word "party" as applicable to appellant in each and every capacity in which she was a party, even though this necessitated treating Mrs. Moffett in her various capacities as present in court in plural capacities.

I.

The judgment dismissing appellants' case (406-407) deprived appellants of the benefit of Revised Statutes 1979, 1980 and 1981, and of the constitutional rights they were designed to enforce, and was rendered without notice, evidence, hearing or jurisdiction so to do, so that the application of Section 948, R. S. Mo. 1939, made said statute a legislative act inflicting punishment without a judicial trial, in violation of Section 10 of Article I of the Constitution.

In an endeavor to defeat the jurisdiction of this Court, appellees, on page 29 of their Suggestions Opposing Jurisdiction (978), have made the following unfounded statement:

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"The self-serving statements of counsel inserted in the record at page 406 and quoted by appellants on page 14 of their Jurisdictional Statement to the effect that these demurrers were sustained 'without notice thereof for hearing or jurisdiction so to do' are disproved by the record itself."

The record recital on page 406 thus attacked is as follows:

"And at the same time, and as a part of the same proceeding and order sustaining said alleged demurrers, said circuit court, without any evidence having been offered to sustain same, and without notice thereof or hearing or jurisdiction so to do, made and entered the following order and judgment in said court and cause:"

Appellees had full opportunity to question the truth of said recital, or any other recital in the abstract, by filing a counterabstract, as provided in Section 1194, R. S. Mo. 1939. They did file a counterabstract, unsuccessfully seeking to question another recital in said abstract, but they never questioned the recital on page 406 in their counterabstract. The recital, therefore, was and is conclusive on the parties and the court, for the reason given in *Eliot* v. *Railroad*, 204 Mo. 1, l. c. 12-13:

"Plaintiff, in filing an additional abstract to supply matters omitted in defendant's abstract, must be considered as having waived any other objection to it than as indicated in the additional abstract; and as the abstract shows that the bill of exceptions was duly filed and also states what the record shows, it is conclusive, in the absence of a counterabstract showing to the contrary." (*Lumber Company* v. *Knights of Pythias, supra; Martin* v. *Castle*, 182 Mo. 216.)

This federal question was raised in the Supreme Court of Missouri by assignments of error I, II, III, V and XXII (945-948). Said assignments were considered and decided against appellants by the State Supreme Court, as shown by its judgment affirming that of the circuit court and, among other things, by the following recital in the opinion (820):

> "Appellants claim error under twenty-two numbered assignments, some being mainly a repetition of others. We have considered all of these assignments, but see no useful purpose in discussing each one separately."

II.

Said unfounded statement of appellees is conclusively contradicted by the record proper and bill of exceptions by recitals other than that attacked by appellees.

The following quotations are from the record proper:

> "Now on this day, by leave of court, plaintiff amends her fifth amended petition by withdrawing and striking out paragraph 45 on page 103, as per amendment filed herein." (l. c. 398.)

> "And now by leave of court, each of the defendants refile their separate demurrers to plaintiffs' fifth amended petition as their separate demurrers to plaintiffs' fifth amended petition as amended." (l. c. 400.)

> "That after the said petition was so amended plaintiffs requested, as shown by that part of this abstract consisting of the bill of exceptions at pages 410 to 427 thereof, that, since the petition was a new petition due to the amendment thereof, plaintiff was entitled to two days' notice of the presentation of demurrers thereto in the following language:
> '* * * since the petition has just been amended and they have just filed their demurrers under the rules

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of the court, I believe we have a right to—I don't want to be taking any technical advantage, but I think it is my duty to the plaintiff to suggest that we are entitled to two days' notice, because there is a new question in the case, it is a new petition.'

"to which the court responded:

'I do not intend to make any such ruling as that.'" (l. c. 400.)

Thereafter, without any intervening proceeding, the record proper shows that the court entered its order sustaining the four separate demurrers of the appellees to the fifth amended petition *as amended,* and as a part of the same order the record shows:

"And now on this 30th day of December, 1944, the separate demurrers of the respective defendants, Commerce Trust Company, Helen Weede, B. C. Howard and Wm. H. Kopp, to the fifth amended petition of the plaintiffs, as amended, *having been sustained by the court upon the ground that there is a misjoinder of parties plaintiff* named in said petition, and the plaintiffs having excepted to the action of the court in sustaining said demurrer on said ground.

And upon the record *and from suggestions of counsel for said defendants now appearing,* the court finds that a third petition of the plaintiffs has been found insufficient *upon said ground,* and that the said defendants are entitled to have plaintiffs' action dismissed as to them and to recover treble costs within and pursuant to the provisions of Section 948, Revised Statutes of Missouri, 1939.

It is therefore ordered by the court that this cause be and the same is hereby assigned to Division No. 6 of this court, the division designated as the Assignment Division of this court under the rules thereof, to which findings and order plaintiffs and each of them except.

(Signed) A. A. Ridge." (l. c. 401-402.)

The next entry is:

"And at the same time, and as a part of the same proceeding and order sustaining said alleged demurrers, said Circuit Court, without any evidence having been offered to sustain same, and without notice thereof or hearing or justification so to do, made and entered the following order and judgment in said court and cause:

In the Circuit Court of Jackson County, Missouri, at Kansas City. Division No. Six.

Louise McGrew Moffett and Louise McGrew Moffett as Executrix of the Estate of Thomas S. Moffett, Deceased, Plaintiffs,

vs.

Commerce Trust Company, a Corporation, Helen Weede, B. C. Howard and William H. Kopp, Defendants.

No. 479103.

Judgment Entry.

"Now on this 30th day of December, 1944, it appearing to the court that a third petition of the plaintiffs has been found insufficient upon the ground that there is a misjoinder of parties plaintiff herein, and that the above named defendants are entitled to have plaintiff's action dismissed by reason thereof and to recover treble costs within and pursuant to the provisions of Section 948 of the Revised Statutes of Missouri, 1939.

It is therefore ordered, adjudged and decreed by the court that this cause be and the same is hereby dismissed as to each and all of the above named appearing defendants, and that defendants have and recover of and from plaintiffs treble costs and have therefor execution.

To which finding and judgment of the court plaintiffs and each of them except.

A. A. Ridge." (l. c. 406-407.)

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The foregoing is the abstract of the record proper. The bill of exceptions more completely establishes the same facts and circumstances (420-425). That bill shows that appellants, through counsel, requested permission to amend the fifth amended petition by withdrawing and striking therefrom paragraph 45 thereof, and that on the making of said request the following occurred:

> "The Court: That will be granted.
>
> Judge Goodrich: The defendant Commerce Trust Company requests to refile its demurrer to the fifth amended petition, already refiled as to the fifth amended petition as amended, as against the fifth amended petition as now amended.
>
> The Court: Let me save the record for all of you. Leave will be granted to the plaintiff to amend the petition by striking out that portion of the petition requested by counsel for plaintiff. Each of the defendants are given leave to refile their demurrers to the fifth amended petition as amended.
>
> Mr. Harding: And said demurrers are refiled, shall we so consider?
>
> The Court: Yes." (l. c. 420.)

Amongst other matters referred to are the following by court and counsel:

> "Mr. O'Donnell: * * * it is our duty to call attention to the fact that now that the petition has been amended * * * then we respectfully suggest that the matter be held until the court has a chance to look into the whole proposition, and make up its mind as to whether or not the petition states a cause of action. Also, since the petition has just been amended and they have just filed their demurrers under the rules of the court * * * we are entitled to two days notice, because there is a new question in the case, it is a new petition.
>
> The Court: I do not intend to make any such ruling

as that. It does seem rather futile to me to have made up my mind on this one point, which was so apparent to me in this case from the pleadings, when I asked for the briefs, to have additional number of days arguments and submission of briefs here. I understand counsel for defendants are willing to rely upon this one ground that is stated in their demurrer.

Judge Goodrich: We think that ground is well taken.

The Court: I am going to make an order sustaining the demurrer on that one ground.

Mr. O'Donnell: In view of the fact that the court has indicated his notion without announcing the ruling—

The Court: I have announced my ruling already, that I am sustaining the demurrers on the ground of misjoinder of parties plaintiff.

To which ruling and action of the court the plaintiffs by their counsel at the time duly excepted and still except." (l. c. 421.)

The record thus recites that Judge Ridge granted appellants' request to amend the fifth amended petition, and the fifth amended petition was so amended (398-399). When the amendment was made, the fifth amended petition as amended was a different petition from the fifth amended petition, and the fifth amended petition was as fully abandoned by appellants as the preceding petitions, which had been abandoned by the filing of amended petitions. The fifth amended petition *as amended* was, in legal contemplation, as separate and different a petition from the fifth amended petition as the fifth amended petition was different from and separate from the third or first amended petitions or the original petition.

The elimination of paragraph 45 from the fifth amended petition removed the ground of objection to the fifth amended petition relied on by appellees and indicated

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in *Kammeyer* v. *City of Concordia*, 352 Mo. 742. The petition in that case alleged that five plaintiffs were injured by 32 fraudulent overt acts pursuant to a conspiracy by defendants there. A demurrer to the petition in that case was sustained, and the petition dismissed by the trial court. On appeal the Supreme Court ruled that since the pleading disclosed that two of the five joint plaintiffs did not sustain any damage, and three did, that the judgment must be reversed and the case remanded "with directions to sustain the demurrer as to plaintiffs Lindemann and Hartwig and overrule the demurrer as to all of the other plaintiffs."

When this situation developed in the case at bar, and appellants requested permission to amend the fifth amended petition by withdrawing and striking out the objectionable paragraph, the circuit court recognized the propriety of the request and granted leave to amend, and thus changed the issue to be determined on demurrer with reference to the unfounded allegation of misjoinder of parties. The court thereupon granted appellees' request for leave to refile their demurrers, not to the fifth amended petition but as stated by appellees' counsel "to the fifth amended petition as amended, as against the fifth amended petition *as now amended*" (420).

The sole basis for the demurrer from appellees' viewpoint was thus removed from the fifth amended petition, and thereafter the fifth amended petition *as amended* was the pleading before the court. Each demurrer was sustained to the "fifth amended petition *as amended*" (401). Consequently, since it was a new petition, the appellees recognized that it was necessary for them to proceed upon it as though no action had hitherto been taken with reference to any preceding petition in the case.

Hence they refiled their demurrers, and then, even had appellants made no request for the enforcement of jurisdictional Rule 29 (402-403), the court lost all jurisdiction to pass upon the demurrers on December 30, 1944 (*Meierhoffer* v. *Hansel*, 294 Mo. 195). The appellees lost all right to have the demurrers to the fifth amended petition sustained, and the court had no jurisdiction to pass on the demurrers to that petition as amended on December 30, 1944.

Rule 29 (402-403) is:

> "Orders in a cause in the assignment division to which a party is not entitled upon the pleadings shall be granted only when they are consented to in open court, or in writing by counsel upon the opposite side, and filed in the cause, or upon a motion duly filed. Upon the filing of such a motion or of any demurrer, the party filing the same shall, on the day of the filing, cause to be served upon the opposite party or his attorney, a notice to the effect that such a motion or demurrer will be called up for hearing on a day, in such notice to be named, which shall be not more than ten nor less than two days, after such filing. Upon the day of filing such motion or demurrer, proof of service of such notice shall be deposited with the clerk of the assignment or other division in which such filing is made.
>
> Failure to comply with this rule shall be sufficient ground, in the discretion of the court, for striking from the files the motion or demurrer so filed.
>
> Provided that this rule shall not prejudice the right of the opposite party to serve notice to call up such motion or demurrer at a day earlier than the day named by the moving party."

The Supreme Court of Missouri had always heretofore held that without compliance with such rules the circuit

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court was without jurisdiction to make orders or render judgments. In *Meierhoffer* v. *Hansel*, 294 Mo. 195, at l. c. 205, the Missouri Supreme Court said:

> "IV. The trial judge recognized the lack of jurisdiction in the Assignment Division, and therefore attempted at the conclusion of the trial and after his decree had been entered to correct all questions of jurisdiction by causing the record to show that same had been assigned to himself as Judge of Division No. 1, and that it was an oversight that the order was not made preliminary to the trial.
>
> Following this assumption to its logical conclusion and considering the rules of the court invoked by appellant, we must hold that the appellant was entitled to have all preliminary matters settled in the Assignment Division and the cause put at issue for a trial. Moreover, he was entitled to have a call made for a listing of his case and a publication of notice thereof, and he was entitled to have said cause listed and an assignment regularly made after such listing to one of the judges of the several divisions of the Circuit Court at Kansas City. In addition to this he should have had his opportunity to exercise his right under Section 1357, Revised Statutes 1919, with respect to the matter of taking a change of venue from the judge of the division to which his cause might have been assigned. Moreover, he should have had an opportunity to present the evidence of witnesses other than mere informal or *ex parte* affidavits.
>
> It is apparent that the constitutional rights of the appellant were violated, as the processes of the law were not permitted to operate in his behalf, and the privileges and benefits of the law were denied to him."

The statement in the foregoing opinion to the effect that "Moreover, he (appellant) should have had an opportunity to present the evidence of witnesses other than

mere informal or *ex parte* affidavits" could be transposed in this case to apply to the record entry (401) reciting that

> "* * * upon the record *and from suggestions of counsel for defendants now appearing,* the court finds that a third petition of the plaintiffs has been found insufficient upon said ground" (misjoinder of parties plaintiff),

which evidence would have shown that the demurrers sustained by Judge Wright to the third amended petition was by a general order (152), generally sustaining the demurrers as to all grounds therein set forth, including the finding that the petition did not state a cause of action under the Civil Rights Act (Sections 1979-1981), and also the following from the opinion of Judge Wright:

> "Plaintiff contends that the conspiracy alleged violates the Federal statutes giving a cause of action for the deprivation of any rights, privileges or immunities secured by the Constitution and laws, and contends that this issue was not in the Kansas cases. I am persuaded that plaintiff's Petition does not state a cause of action under the statutes relied upon, and I am further convinced that even though the acts alleged would constitute a cause of action under the Federal statutes, yet the overt acts or matters and things about which plaintiff complains have been tried and determined and cannot now be relitigated as a basis of a cause of action."

which circumstance establishes that Judge Wright expressly held that "plaintiff's petition does not state a cause of action under the statutes (Federal) relied upon." And appellants were also entitled to offer any evidence and call attention to the record before Judge Buzard, showing that Judge Buzard had overruled the separate

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demurrer of appellee Kopp, and that appellee Kopp had then filed a motion to make definite and certain, and that no demurrer by Kopp was pending when Judge Terte sustained a non-pending demurrer for Kopp (60-61); and that no demurrer by any other appellee was lawfully pending because Judge Buzard had overruled motions by the other three defendants seeking to have the first amended petition stricken out because of the addition of Mrs. Moffett as executrix as party plaintiff—in other words, on the alleged ground of misjoinder of parties plaintiff.

So that Judge Ridge was without jurisdiction to apply Section 948 R. S. Mo. 1939 because, under the law, he was not authorized to count the void orders made by himself and Judges Terte and Wright when he made his finding of fact and rendered the penal judgment dismissing the case as to each and all of the defendants, and assessing treble costs against appellant.

The general orders of Judges Terte and Wright purporting to sustain demurrers to previous petitions were not restricted to total elimination of any decision of federal questions by the trial court. Said orders and the record, supplemented by the opinion of Judge Wright, shows that federal questions involved herein were decided by Judge Wright. Since said suggestions of counsel were accepted by Judge Ridge as one of the jurisdictional bases of his judgment applying Section 948, then it appears from the record that federal questions here involved were decided and were implicit in the judgment of the Circuit Court, and its affirmance by the Supreme Court was a decision by that court also affirming that of Judge Wright, deciding that appellants pleading did not state a cause of action under the civil rights acts. (R. S. 1979, 1980, 1981.

It thus appears that the finding of fact, based in part on the "suggestions of counsel" for appellees (401), seeking to eliminate from the record a decision on the federal questions involved, were "suggestions" which were the unfounded basis of Judge Ridge's finding of fact. And, to use appellees' language as applied to the recital at page 406, showing lack of notice and jurisdiction, said "suggestions of counsel for said defendants now appearing" are "disproved by the record itself."

The only purpose served by them in this case is to establish conclusively the fact that Judge Ridge delegated his judicial duties to appellees' counsel and that "the functions of the judge were abdicated" etc. (*Ensminger* v. *Powers*, 108 U. S. 292; *Kelly* v. *Town of Milan*, ~~223~~ Fed. 842).

Appellees, appreciating the fact that Judge Ridge did not conform to judicial standards in his acts on December 30~~26~~, 1944, with reference to a full hearing of the questions presented, seek to escape their effect by said unfounded charge, claiming that because hearings were had on the original, third and fifth amended petitions, that no hearing was necessary with reference to the fifth amended petition as amended, nor necessary with reference to the part of their demurer consisting of motions, nor necessary before Judge Ridge undertook to act and render a final judgment. But the foregoing record discloses the acts of Judge Ridge in this case come within the condemnation of the opinion in *Morgan* v. *United States*, 304 U. S. 1, when it reversed the tribunal below and when it used the following language, l. c. 18:

> "The right to a hearing embraces not only the right to present evidence, but also a reasonable opportunity to know the claims of the opposing party

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and to meet them. The right to submit argument implies that opportunity; otherwise the right may be but a barren one."

And at 19-20:

> "Congress, in requiring 'a full hearing,' had regard to judicial standards, * * * not in any technical sense, but with respect to those fundamental requirements of fairness which are of the essence of due process in a proceeding of a judicial nature. If in an equity cause a special master or the trial judge permitted the plaintiff's attorney to formulate the findings upon the evidence, conferred *ex parte* with the plaintiff's attorney regarding them, and then adopted his proposals without affording an opportunity to his opponent to know their contents and present objections, there would be no hesitation in setting aside the report or decree as having been made without a fair hearing."

So that the concrete question thus raised for determination here is whether or not the record, or appellees' statements contradicted by said record, will constitute the basis for its decision on this question.

The foregoing conclusively establishes that the application of Section 948, R. S. Mo. 1939, inflicting the punishment therein provided, was unlawfully inflicted upon appellants, without trial, hearing or jurisdiction so to do, and establishes that such section, as applied, "is a legislative act which inflicts punishment without a judicial trial."

The foregoing considerations destroy every contention made in appellees' suggestions and necessitate the denial of its motion to dismiss or affirm.

Judge Ridge was without jurisdiction to assign the case to his own Division 6 for final disposition without complying with the rules of the court (402-407).

The law of the State as declared on this question in *Meierhoffer* v. *Hansel*, 294 Mo. 195, at l. c. 205, is:

> "* * * he was entitled to have a call made for a listing of his case and a publication of notice thereof, and he was entitled to have said cause listed and an assignment regularly made after such listing to one of the judges of the several divisions of the Circuit Court of Kansas City. In addition to this *he should have had his opportunity to exercise his right under Section 1357, Revised Statutes 1919, with respect to the matter of taking a change of venue from the judge of the division to which his cause might have been assigned.*"

Judge Ridge had no jurisdiction after the case got into his division to take any action, until appellants were duly notified and had an opportunity to take a change of venue if they so desired.

Section 1357, R. S. Mo. 1919, referred to in said opinion, carried forward in the 1929 revision as Sec. 907, and in the 1939 revision as Section 1058.

So that the same statute and the same law was in force on December 30, 1944, as were in force when the Meierhoffer case was decided. Said statute is as follows:

> "Sec. 1058. A change of venue may be awarded in any civil suit to any court of record, for any of the following causes: First, that the judge is interested or prejudiced, or is related to either party, or has been of counsel in the cause; second, that the opposite party has an undue influence over the mind of the judge; third, that the inhabitants of the county are prejudiced against the applicant; fourth, that the

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opposite party has an undue influence over the inhabitants of the county; but in no case shall more than one change be granted either party."

The recital in the record (406) that

"as a part of the same proceeding and order sustaining said alleged demurrers"

that court made the record entry shown in the record as to the finding of fact and judgment is substantiated by the physical facts shown in the record.

And the fact that, in making his finding of fact he placed the responsibility therefor on the counsel for appellees absolutely demonstrates that he abdicated his judicial function and so his order applying Section 948 and dismissing the case was an order made without jurisdiction, and was a void order.

Had appellants only known what the judge purported or intended to do, so as to deprive appellants of the Code which went into effect the next court day, and which repealed the statute authorizing demurrers, they could have prevented his acts by taking a change of venue, and further deprived Judge Ridge of jurisdiction to apply said Section 948, which, according to the opinion herein discussing it, was also repealed. The opinion says (826):

"This statute, *until the effective date of our new Code,* was in force for one hundred and twenty years."

The act of Judge Ridge in denying appellants the benefit of Rule 29 (402), and the recital in his finding of fact entered therein, before he assigned the case to his own division, that it was in part based (424) "upon the suggestions of counsel for said defendants now appearing"

was absolute proof that the second ground of the change of venue statute, to-wit: "that the opposite party has an undue influence over the mind of the judge," are considerations which demonstrate what the recital on page 406 of the record declares, to-wit: that Judge Ridge applied Section 948 without "evidence, hearing, or jurisdiction so to do," and that he delegated his judicial functions to counsel for appellees. *Ensminger* v. *Powers*, 108 U. S. 292, l. c. 298-301, *Kelly* v. *Town of Milan*, 21 Fed. 842. And so, in every conceivable sense, the manner of its application made Section 948 a mere bill of attainder, and such circumstances contradict the recital in the opinion of the State Supreme Court that said statute was a statute which "inflicts no penalty without a hearing." (826.)

It may be that, in the abstract, the statute meant just that, but, as applied herein, it inflicted the penalty provided in it without any hearing or opportunity to appellants to be heard. It was this unlawful application of said Section 948 that frustrated the power of either the Circuit Court or the Supreme Court to give appellants any relief under R. S. U. S. 1979, 1980 and 1981, or to award any damages for the deprivation of all the constitutional rights referred to in the record herein, and was the basis of the unlawful denial by the state courts of said federal rights.

It may aid in the solution of the question if, in addition to pointing out that Judge Ridge, in violation of the court rule and the statute which bound him, and without jurisdiction, trial or hearing, used the last hours of the life of Section 948 to destroy appellants' federal rights.

We have this further question in the case, to-wit: Judge Ridge declared (422):

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"If the defendants are not insisting on those other grounds, I will just overrule the other grounds of the demurrer."

By said statement it is apparent that Judge Ridge believed that appellant in both capacities had a cause of action for a violation of her federal rights under the said Civil Rights Act, and that appellees knew that he had come to that conclusion. Yet Judge Ridge, without right or authority so to do, rendered a judgment on the merits under the Swing case against appellant, forever forfeiting her right to recover for the injury resulting from such violation of her federal rights. And the State Supreme Court by its findings that appellants were not denied due process and that the petition did not state a cause of action ended the litigation and prevented any further action.

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III.

The constitutional provision prohibiting the passing of bills of attainder by states was violated by the Missouri State Courts in their application of Section 948, R. S. Mo. 1939, without notice, evidence, trial or jurisdiction, so that, as applied by the judgment, said Section 948 was a mere legislative act which herein inflicted punishment without a judicial trial, and was therefore repugnant to said constitutional provision.

The fact that a tribunal and a process were appointed by the legislature to execute the sentence of the statute does not take away its vice. For, as stated in *State* v. *Julow*, 129 Mo. l. c. 174, quoting Comstock, J., in *Wynehamer* v. *People*, 3 Kern. 378, in pointing out that it is not due process of law if "the legislature shall pass a law to effectuate the wrong," l. c. 174:

> "* * * nor will it make any difference, although a process and a tribunal are appointed to execute the sentence. If this is the 'law of the land,' and 'due process of law,' within the meaning of the Constitution, then the legislature is omnipotent. It may, under the same interpretation, pass a law to take away liberty or life without a pre-existing cause, appointing judicial and executive agencies to execute its will. Property is placed by the Constitution in the same category with liberty and life."

The Missouri courts were merely the tribunals which executed the penal sentence of Section 948, R. S. Mo. 1939, without a judicial trial. In *State* v. *Julow*, referring to the prohibition of the XIVth Amendment, at l. c. 172 it is further said:

> "* * * it will be noted that the rights of life, liberty and property are grouped together in the same sentence; they constitute a *trinity of rights*, and each as opposed to unlawful deprivation thereof, is of equal constitutional importance. With each of these rights, under the operation of a familiar principle, every auxiliary right, every attribute necessary to make the principal right effectual and valuable in its most extensive sense, pass as incidents of the original grant. 'The rights thus guaranteed are something more than the mere privileges of locomotion; the guarantee is the negation of arbitrary power in every form which results in a deprivation of a right.'
>
> These terms, 'life,' 'liberty,' and 'property,' are representative terms and cover every right to which a member of the body politic is entitled under the law."

It thus appears that every right which a person has is secured by the Constitution, and that even in Missouri the fact that a legislative act is applied to deprive any

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person of rights so secured is not cured because a process and a tribunal are provided to inflict the punishment provided in the legislative judgment. Neither nor both the legislature and the judges of Missouri have the power attributed to the highest court in England by Coke when he said that its power and jurisdiction is "so transcendent and absolute that it cannot be confined either for causes or persons within any bounds" (Coke's Inst., Part Four, p. 36).

Neither the Circuit Court nor the State Supreme Court, in this case, deemed themselves confined, either for the causes of action set forth in the petition or the persons of appellants, within any bounds. And so their acts, in applying Section 948, were acts which could not be justified because their power and jurisdiction under the law is not "so transcendent and absolute that it cannot be confined, either for causes or persons, within any bounds."

Therefore Section 948, as applied, was a bill of attainder from the viewpoint expressed in both opinions in *United States* v. *Lovett*, 90 Law Ed. 1052. The concurring opinions point out that the safeguards in the Constitution with reference to bills of attainder

> "• • • were not defined by the Constitution. They were defined by history. Their meaning was so settled by history that definition was superfluous. Judicial enforcement of the Constitution must respect these historic limits." (l. c. 1062.)

> "'Upon this point a page of history is worth a volume of logic.'" (l. c. 1063.)

In Coke's discussion of the highest court in England, 4th Inst., he appends some historical examples to illustrate the iniquity of bills of attainder in the days of the Henrys.

Those examples, in a legal sense, were no more iniquitous than the application in this case of Section 948. Said Coke, l. c. 37:

> "And albeit I find an attainder by parliament of a subject of high treason being committed to the tower, and forth-coming to be heard, and yet never called to answer in any of the houses of parliament, although I question not the power of the parliament, for without question the attainder standeth of force in law: yet this I say of the manner of the proceeding, *Auferat oblivio, si potest; si non, utcenque silentium tegat*: for the more high and absolute the jurisdiction of the court is, the more just and honorable it ought to be in the proceeding, and to give example of justice to inferiour courts. But it is demanded, since he was attainted by parliament, what should be the reason that our historians do all agree in this, that he suffered death by a law which he himself had made. For answer hereof, I had it of Sir Thomas Gawdye knight, a grave and reverend judge of the kings bench, who lived at that time, that king H. 8 commanded him to attend the chiefe justices, and to know whether a man that was forth-coming might be attainted of high treason by parliament, and never called to his answer. The judges answered, that it was a dangerous question, and that the high court of parliament ought to give examples of inferiour courts for proceeding according to justice, and no inferior court could do the like; and they thought that the high court of parliament would never do it. But being by the express commandement of the king, and pressed by the said earle to give a direct answer: they said, that if he be attainted by parliament, it could not come in question afterwards, whether he were called or not called to answer. And albeit their opinion was according to law, yet might they have made a better answer, for by the statutes of Mag. Cart. ca. 29. 5 E. 3 cap. 9. & 28 E. 3. cap. 5. No man ought to be condemned without answer, &c. which

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they might have certified, but *facta tenent multa, quae fieri prohibentur;* the act of attainder being passed by parliament, did bind, as they resolved. The party against whom this was intended, was never called in question, but the first man after the said resolution, that was so attainted, and never called to answer, was the said earl of Essex; whereupon that erroneous and vulgar opinion among our historians grew, that he died by the same law which he himself had made." The rehearsal of the said attainder can work no prejudice, for that I am confidently persuaded, that such honourable and worthy members shall be from time to time of both houses of parliament, as never any such attainder, where the party is forth comming, shall be had hereafter without hearing of him.

But Coke's opinion is shown to be valueless by this record for in this case the callous example set by some of our English ancestors was followed. He further says:

"Doth our law judge any man, before it hear him and know what he doth? It is not the manner of the Romans to deliver any man to die, before that he which is accused have the accusers face to face, and have license to answer for himself concerning the crime laid against him.

* * * * * *

And the conclusion is after hearing and discerning the cause, consider, consult, and then give sentence.

And as evil was the proceeding in parliament against Sir John Mortimer, third son of Edmond the second earl of March (descended from Lionell duke of Clarence) who was indicted of high treason for certain words, in effect, that Edmond earl of March should be king by right of inheritance, and that he himself was next rightful heir to the crown after the said earl of March; wherefore if the said earl would not take it upon him, he would; and that he would go into Wales, and raise an army of 20,000

men, &c., which indictment (without any arrangnment or pleading) being meerly faigned to blemish the title of the Mortimers, and withal being insufficient in law, as by the same appeareth, was confirmed by authority of parliament; and the said Sir John being brought into the parliament without arraignment or answer, judgment in parliament was given against him upon the said indictment; that he should be carried to the tower of London, and drawn through the city to Tiborn, and there hanged, drawn and quartered, his head to be set on London bridge, and his four quarters on the four gates of London, as by the record of parliament appeareth."

Hallam, in Volume I Constitutional History of England, pages 43-46, discusses the same and similar precedents as follows:

"Cromwell, a man not destitute of liberal qualities, but who is liable to the one great reproach of having obeyed too implicitly a master whose commands were crimes, inquired of the judges whether, if parliament should condemn a man to die for treason without hearing him, the attainder could ever be disputed. They answered that it was a dangerous question, and that parliament should rather set an example to inferior courts by proceeding according to justice. But being pressed to reply by the king's express commandment, they said that an attainder in parliament, whether the party had been heard or not in his defense could never be reversed in a court of law. No proceedings, it is said, took place against the person intended, nor is it known who he was. But men prone to remark all that seems an appropriate retribution of Providence, took notice that he who had thus solicited the interpreters of the law to sanction such a violation of natural justice, was himself its earliest example. In the apparent zenith of favor this able and faithful minister, the king's vice-

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gerent in his ecclesiastical supremacy, and recently created earl of Essex, fell so suddenly, and so totally without offence, that it has perplexed some writers to assign the cause. But there seems little doubt that Henry's dissatisfaction with his fourth wife, Anne of Cleves, whom Cromwell had recommended, alienated his selfish temper, and inclined his ear to the whisperings of those courtiers who abhorred the favorite and his measures. An act attainting him of treason and heresy was hurried through parliament, without hearing him in his defence. The charges, indeed, were so ungrounded that had he been permitted to refute them, his condemnation, though not less certain, might, perhaps, have caused more shame. This precedent of sentencing men unheard, by means of an act of attainder, was followed in the case of Dr. Barnes, burned not long afterwards for heresy."

Note 1 says, l. c. 45:

"1 Coke's 4th Institute, 37. It is however said by lord Herbert and others that the Countess of Salisbury and the Marchioness of Exeter were not heard in their defense."

According to the judges, even of that distant and barbarous age, the variety of attainder above described was unjust and their opinion necessitates reversal herein. Its infliction upon the Countess of Salisbury and the Marchioness of Exeter mentioned is paralleled only by the treatment inflicted on appellants herein and inflicted on Mrs. Moffett and her sister in the Kansas litigation. For, it appears in the opinion in the Howard fee case, 345 Mo. 741, that while Mrs. Clark was the duly appointed administratrix of the Moffett Brothers partnership estate in Kansas and, as such, of course in legal possession of the assets thereof and the only person authorized to defend, yet that she was not a party as administratrix of said estate to the suit in Kansas, where Commerce

Trust Company and Mr. Howard represented conflicting interests. Yet the Kansas district judge rendered a judgment against her, though Mrs. Clark as administratrix of Moffett Brothers estate was not a party to the suit in his court in the capacity in which he rendered a judgment against her and in which, as such, Mrs. Clark was prevented from making the defense that she could have made had she been a party as such administratrix—and in rendering a judgment also against Commerce Trust Company, at its request; though it was not a Kansas administrator and though it had no possession of assets of said estate in Kansas, pursuant to which said Commerce Trust Company trespassed upon the assets in the legal possession of Mrs. Clark and as such administrator took them for the ostensible purpose of paying the fraudulent judgment. Among many other wrongs, said district court later credited the value of the Kansas lands of Moffett Brothers as $99,700.00 in 1934-1935 (243), when it became necessary to get as much as possible into the estate of John Moffett for the benefit of the confederates. And when it became necessary to accomplish another purpose in making an order of distribution, though the value had not changed, as he well knew, the said judge made an order disposing of the lands in 1936-1937 at $181,873.98 (243), or at about twice the amount for which they were fraudulently credited on the fraudulent judgment.

All these, and other, facts appeared in the fifth amended petition as amended (154-323), yet the Supreme Court of the state decided that appellants were accorded due process (827) and thereby established that Section 948, as applied by Judge Ridge and affirmed by said State Supreme Court, was a true bill of pains and penalties, and that the judgment resulting from its application can not properly remain unreversed.

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The counsel whose suggestions resulted in the erroneous finding of fact by Judge Ridge seek to cause this Court to believe that only one federal question was raised and decided by the State courts. But the opinion of Judge Clark expressly points out that all the federal questions set up by assignments of error in that court were considered and decided (820).

And so, in a legal sense, the treatment accorded appellants by the Circuit and Supreme Courts of Missouri, in this case, in disposing of her rights without notice, evidence, trial or jurisdiction, operated to make Section 948, as pleaded, a bill of pains and penalties, or attainder, within the meaning of the historical precedents referred to by Coke and Hallam.

Section 948, R. S. Mo. 1939, is also a bill of attainder measured by the standard applied in the opinion of the court in *United States* v. *Lovett,* 90 Law Ed. 1052, l. c. 1058-1059. There this Court held that a bill of attainder, or of pains and penalties, is a legislative act which inflicts punishment without a judicial trial.

Section 948 was thus applied under the record as disclosed in the foregoing statement. Hence the law in the opinion as follows applies:

> "We hold that Sec. 304 falls precisely within the category of Congressional actions which the Constitution barred by providing that 'No bill of attainder or *Ex Post Facto Law* shall be passed.' In *Cummings* v. *Missouri,* 4 Wall. (U. S.) 277, 323, 18 L. Ed. 356, 363, this court said, 'A bill of attainder is a legislative act which inflicts punishment without a judicial trial. If the punishment be less than death, the act is termed a bill of pains and penalties. Within the meaning of the Constitution, bills of attainder include bills of pains and penalties'."

Speaking of *Cummings* v. *Missouri*, 4 Wall. 277, 32
and *Ex Parte Garland*, 4 Wall. 333, this Court said:

> "Neither of these cases has ever been overruled
> They stand for the proposition that legislative act
> no matter what their form, that apply either t
> named individuals or to easily ascertainable member
> of a group in such a way as to inflict punishment o
> them without a judicial trial are bills of attainde
> prohibited by the Constitution. Adherence to thi
> principle requires the invalidation of Sec. 304. We d
> adhere to it."

IIIa.

The foregoing authorities showing that Section 948, a
applied, constitutes a bill of pains and penalties, is ap
plicable to the partnership administration statutes, an
especially Sections 86, 87 and 88 thereof, and demonstrat
that said sections are repugnant to the bill of attainde
prohibition of Section 10 of Article I from any poi
from which said partnership administration statute ma
be examined. For said statutes are not statutes whic
could be held valid in the abstract. They are a me
legislative decree which provides for the infliction
punishment, and the court referred to in Section 88
merely a tribunal of the variety described by Judge Co
stock, as quoted in *State* v. *Julow*, 129 Mo., l. c. 174,
above quoted.

Said partnership administration statutes are repu
nant, not only to the bill of attainder provision of th
Constitution, but also to Article III of the Treaty wi
France of 1803. And said Treaty, whether it becam
obsolete or not, having created rights in the inhabitan
of Louisiana to the protection of the Vth Amendmen
had performed its function as far as this partnership

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concerned and must be respected by the courts, under the decision of Chief Justice Marshall in *Chirac* v. *Chirac*, 2 Wheat. 259, where, at l. c. 277, it is said:

> "If a treaty or any other law has performed its office by giving a right, the expiration of the treaty or law cannot extinguish that right * * * the court if of opinion that the treaty had its full effect the instant a right was acquired under it; * * * and that its expiration or continuance afterwards was unimportant."

See

Geoffrey v. *Riggs*, 133 U. S. 258.
Pollock v. *Gibbs*, 14 Pet. 353.

And, of course, said partnership administration statutes are also void, as pointed out in the jurisdictional statement, because in conflict with the XIIIth and XIVth Amendments.

And so the application of Section 948 deprived appellants of the rights secured by Article III of said Treaty, and the XIIIth and XIVth Amendments, all of which were referred to in the fifth amended petition as amended, and their protection denied by the state court by its application of Section 948.

IV.

Appellees claim (968), in their point II on page 19, that

> "There is no provision of the Constitution or Statutes of the United States which gives the appellants the right to maintain *jointly* in the courts of Missouri, the instant suit."

They also say that (968):

> "• • • there was no decision against the validity of Sections 1979, 1980 and 1981, U. S. R. S. (Secs. 43, 47 and 48, Title 8, U. S. C.) or against the right of either appellant to maintain an action thereunder."

Appellees say that the fact that the court ruled that appellants could not recover in both capacities, and its refusal, at appellees' request, to rule whether plaintiff could recover in either capacity, did not deny any federal right. However, the state court did not give any effect to any federal right vested in appellant in either capacity, or in both capacities. So, the failure of the court to enforce appellants' admitted federal rights was a denial thereof by the state court. And the question is whether a state court can deny federal rights to one or more plaintiffs who could have said federal rights vindicated in the federal courts.

We direct attention to the fact that this Court, in *Guaranty Trust Co.* v. *York*, 326 U. S. 99, 119, in a diversity case based on state law said, l. c. 108-109:

> "Here we are dealing with a right to recover derived not from the United States, but from one of the states. When, because the plaintiff happened to be a nonresident, such a right is enforceable in a federal as well as in a state court, the forms and modes of enforcing the right may at times, naturally enough, vary because the two judicial systems are not identic. But since a *federal court* adjudicating a state-created right solely because of the diversity of citizenship of the parties is for that purpose, in effect *only another court of the state,* it cannot afford recovery if the right to recover is made unavailable by the state, nor can it substantially affect the enforcement of the right as given by the state."

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The principle above stated could never have been applied by this Court in that case were it not for the principle authorized by *Erie R. Co.* v. *Tompkins*, 304 U. S. 64. And so, likewise, when a state court sitting in any state is adjudicating a question of federal right, the state court is, for that purpose, *only, another federal court.*

In *Montgomery & Atl. Motor F. L.* v. *Morris*, 8 So. (2d) 502, at l. c. 504, it is said:

> "Where a federal question is involved, the state courts in passing on it are federal courts in addition to being state courts, and their decisions are reviewable by the Supreme Court of the United States."

Appellees contend (971) that the Civil Rights Act, R. S. 1979, did not authorize any person or entity to bring a suit to enforce the liability there provided for. They say that that question was not settled by the Act of Congress, but that that question must be ascertained by reference to the laws of Missouri rather than to the Act of Congress and the Constitution. But the section itself contradicts the contention. Appellees are liable because they subjected "any citizen of the United States or other person within the jurisdiction thereof" to the alleged deprivations.

This Court has held that the word "citizen," in Section 1 of the XIVth Amendment does not limit the meaning of the word "person" to citizens, but it has been held by this Court that any kind or variety of person, artificial, Chinese, natural, or otherwise, is a person within the meaning of the XIVth Amendment. Since Section 43 is based on the XIVth Amendment, the words "or other person" includes an administrator of an estate. And when the legislature came to provide how there could be a

recovery, it provided that every person thus subjecting such citizens or persons to said deprivations "shall be liable to the party injured." The word "party," as used in Webster's Dictionary, may include more than one, and usually the word party is used to designate more than one person, or one side of a contest.

And, so, Mrs. Moffett is a party, but so in two capacities. Nay, she has more than two in this case. She is the residuary devisee, and in that capacity she is in this case. She is the residuary legatee, and in that capacity she is a party in this case. She is the executrix of her husband's estate, and in that capacity she is a party in this case. And, apart from said capacities, she is also a party to this case as a joint owner individually of the property of which Thomas S. Moffett devised and bequeathed his interest to her (322).

And, so, the statute making appellee liable did not select any capacity, but by its impersonal and all embracing terms provided that for their unlawful acts appellees "shall be liable to the party injured" regardless of the number of capacities in which the party was injured.

The decision of the Supreme Court of Missouri wrote a limitation into said statute, which the Congress did not, and undertook to say that the appellees are not liable to the party injured just because they wronged her in more respects than one.

And when it is taken into consideration that the Congress provided that the appellees "shall be liable to the party injured," not in the abstract but "in an action at law, suit in equity, or other proper proceeding for redress," the intent of Congress is manifest. That intention was to enable the party injured, regardless of the capacity in which the injury was sustained, to enforce the joint liability of appellees in a single action at law suit

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in equity or other proper proceeding in every capacity in which she was injured.

In *State* v. *Blout*, 85 Mo. 543, referred to a statute providing

> "that such prohibition shall not apply to waters wholly on the premises of such person or persons using such devices."

The question was whether that statute applied to waters wholly on the premises of "such person or persons." Said the court, l. c. 546:

> "We are of the opinion that the word persons, as used in the proviso, means joint owners."

Mrs. Moffett, under the allegations, individually was a joint owner of the property with her late husband under the admitted allegations and the decisions of the Supreme Court of Missouri.

Appellees claim that the decision in *Wells* v. *Davis*, 303 Mo. ....., is contrary to appellants' contention because, say appellees, the federal statute there provided that the action should be brought by the administrator of the deceased. But that statute, like Section 1979, merely designated who should bring the action.

Section 43, Title 8 U. S. C., is more complete and definite than that statute, because it specifies to whom the appellees are liable, and provides that they shall be liable to the party injured, not alone in an action at law but in any conceivable kind of an action, or suit, or proceeding, for it says they shall be liable to the party injured at law, in equity, or other proper proceeding for redress.

The claim that because neither state nor federal court is mentioned by the statute providing that the appellees

shall be liable to the party injured applies only to actions in the federal court, and not to actions in the state court, is contradicted by the opinion of this Court in *Stewart* v. *Kahn*, 11 Wall. 493. In that case an act of Congress was involved in a state court providing for limitation of actions in certain cases. In disposing of the contention there made this Court said, l. c. 505-506:

> "But it has been insisted that the Act of 1864 was intended to be administered only in the Federal courts, and that it has no application to cases pending in the courts of the states.
>
> "The language is general. There is nothing in it which requires or will warrant so narrow a construction. It lays down a rule as to the subject, and has no reference to the tribunals by which it is to be applied. A different interpretation would defeat, to a large extent, the object of its enactment. * * * The judicial anomaly would be presented of one rule of property in the Federal courts, and another and a different one in the courts of the state; and debts could be recovered in the former which would be barred in the latter. This would be contrary to the uniform spirit of the national jurisprudence from the adoption of the judiciary act of 1789 down to the present time."

This Court there pointed out that the facts on which its jurisdiction depended were not shown in a bill of exceptions. And this Court there pointed out its own obligation in such a case as this as follows:

> "But enough is shown to develop clearly the action of the Supreme Court of the state, and the point we are called upon to review. There is no controversy as to the facts. Under the circumstances, a refusal on our part to exercise the jurisdiction invoked would involve a sacrifice of substance to form, and unwarrantably defeat the ends of justice."

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And, so, here the record proper is supplemented by the bill of exceptions (410-425), and both point out that the state court undertook to amend the Act of Congress here involved by inserting therein the provision that the party injured could not recover except in such capacities as the judges of the State of Missouri chose, without regard to either the law of the state or of the United States on the question.

Notwithstanding the foregoing circumstances appellees say on page 22 of their suggestions (971), of the Civil Rights Act, that it is an act

> "which vests no specific person or entity with a right o faction as a part of the terms of the statute."

It would seem that if such Civil Rights Act did not vest any right of action, as appellees say, in any "specific person or entity," then nobody is vested with any action to enforce thereunder, either in the state or federal court.

Appellees have thus admitted that they persuaded the State Supreme Court to hold that Section 43, Title 8 U. S. C., is invalid and have admitted that by that act they conferred obligatory appellate jurisdiction of this case on this Court under Section 237a, Judicial Code.

In discussing *Georgia* v. *Pennsylvania R. R. Co.*, 324 U. S. 439, 89 Law Ed. 1050, after vainly attempting to point out distinctions between the principle applied in that case and the applicable principle in this, they say (971):

> "This decision could have no proper application to a case brought in the State Court under the Federal Civil Rights Act, which vests no specific person or entity with a right of action as a part of the terms of the statute * * *"

If the Civil Rights Act vested no specific person nor entity with a right of action as a part of the terms of the statute, then the Congress of the United States in enacting Section 43, Title 8 U. S. C., was engaged in doing that which was wholly vain. For, if it vested no person with a right of action as a part of its terms, then no person could sue upon said section in any action at law, suit in equity or other proper proceeding for redress and all the decisions of this and other courts to the contrary are wrong.

The State of Georgia in the above case was permitted by this Court to sue in one capacity as a representative "of her people against the continuing wrong done to them," and in another capacity as the individual "owner of a railroad."

The Constitution is a federal law. It contains no joinder provisions. But *Georgia* v. *Pennsylvania R. R. Co., supra,* was a case instituted in this Court by virtue of clause 1 of Section 2 of Article III of the Constitution, providing that

> "The judicial power shall extend to all cases, in law and equity, arising under this Constitution, the laws of the United States * * * to controversies * * * between a state and citizens of another state."

Clause 2 of Section 2 distributing the said jurisdiction provided:

> "In all cases * * * in which a state shall be a party, the Supreme Court shall have original jurisdiction."

These provisions of the federal law contained no joinder provision, but neither did they provide that the State could be cribbed, cabined and confined to any one capacity as a suitor in this Court. And so this Court

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ruled that the fact that Georgia was a State, and that this Court was given jurisdiction to do justice to it as a State, then that this Court was authorized to administer justice and give it relief in any and every capacity in which it appeared as a State, and hence decided the very question to be decided in this case with reference to appellees' contention as to lack of jurisdiction.

This Court's jurisdiction was not divested or crippled by the "more than one capacity" circumstance in that case, and this because the Constitution declared that this Court had jurisdiction—that is, power to enforce the applicable rule, to-wit: administer right and justice under the Constitution to the same State in as many capacities as it had sustained injury.

This Court did not confine its jurisdiction to the application of the federal law in *Georgia* v. *R. R.* to one capacity or another. On the contrary, it properly held that its function was to right Georgia's wrongs sustained in every capacity. It simply held that all of the defendants in that case "shall be liable to the injured party" (to borrow the language of R. S. 1979) in every capacity in which the State alleged and sustained injury.

If the claim that the Civil Rights Act vests no specific person or entity with a right of action as a part of the terms of the statute, and contains no joinder provisions, as appellees claim, then, since the above constitutional provisions are likewise deficient in such provisions, it would seem that, according to appellees, this Court erroneously decided the case of *Georgia* v. *Pennsylvania R. R. Co. et al.*, 324 U. S. 439.

But since said decision is not erroneous, but by virtue of the Constitution formulated and applied the principle authorized by the supreme law which bound the Missouri

court in the decision in this case, and said decision is direct authority for the proposition that this Court has appellate jurisdiction in this case.

Appellees rely on such cases as *Minnesota & St. Louis R. R. Co.* v. *Bombolis*, 241 U. S. 211, and *Mo. ex rel.* v. *Taylor*, 266 U. S. 200, in support of their singular contention. In the Bombolis case, plaintiff recovered and the defendant claimed that since the right to recovery was based on a federal law, then the VIIth Amendment applied. But the Court very properly pointed out that the VIIth was included in the first eight amendments, and that such amendments had been held to have no application to the states ever since its decision *Barron* v. *Baltimore*, in 1832, *Missouri* v. *Taylor, supra*, was a case where plaintiff recovered and wherein a judgment was rendered in the state court against a nonresident defendant whose property was seized by attachment in the state court. But this Court held that on removel to a federal court, an nonresident defendant could not have its property released except as provided under the state law. The question involved in both these cases had nothing to do with the creation of a right of action, or vesting a right in any person who could sue, such as Section 43, Title 8 U. S. C., and the plaintiffs recovered under the federal statutes there involved.

The state cases of *Niehaus* v. *Greenspons and Rockwood* v. *Crown Laundry*, or the other cases on which appellees claim to rely, have no application whatsoever to the question involved in this case.

The word "party," as defined in Webster's College Dictionary, 5th Ed., may include more individuals than one on the opposite side of a contest.

The question here involved has been well decided in

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Picking et al. v. *Pennsylvania R. R. Co. et al.*, 151 Fed. (2d) 240, l. c. 249. There the court, after discussing at length and calling attention to the decisions of this Court, including *Screws* v. *United States*, 325 U. S. 91, *United States* v. *Classic*, 313 U. S. 299, and others, said, l. c. 249:

> "No question as to the sufficiency of the statute to grant a right of civil action should now be heard."

The Court then proceeded, l. c. 249:

> "(10) It follows that if the plaintiffs in the case at bar were deprived of a federal right by state officials or officers acting 'under color of any law'—or as may be stated more aptly in the instant case 'under color of any statute * * * of any State—these officials must respond in damages to the plaintiffs as prescribed by R. S. Sec. 1979. The allegations of the complaint assert in substance that the individual defendants (officers or officials of Pennsylvania or New York) acting 'under color of law' or 'pretense' of law deprived the plaintiffs of liberty without due process of law. The plaintiffs have stated a valid cause of action rising under R. S., Section 1979 * * *"

There is no question in this case as to the jurisdiction and power of the Missouri courts to give relief in a case where an executor and devisee are joint parties plaintiff. The opinion herein states (822):

> "We concede that in some circumstances an executor and a devisee may join as plaintiffs. * * * The petition attempts to state a joint cause of action in favor of Mrs. Moffett as an individual and in her favor as executrix of her deceased husband's estate. * * * True, the petition alleges 'that said property of which plaintiff was so deprived, is, and was, a part of the gains of the industry of plaintiff and her late husband.'"

It thus appears that the ultimate facts are alleged which show that Mrs. Moffett, in every capacity in which she appears in this case, has been injured. And so Mrs. Moffett, in all capacities, comes directly within the description of the person to whom appellees are liable, to-wit: the party injured.

The foregoing demonstrates that the Missouri court has jurisdiction and is able to give Mrs. Moffett, in both capacities, the relief provided by Section 43, Title 8 U. S. C. And so the said contentions of appellees do not aid the court, and have no application, and are invalid.

In their Point II, at pages 21-22 (970), appellees unsuccessfully attempt to point out and distinguish between the principle applied in *Georgia* v. *Pennsylvania R. Co. et al.*, 324 U. S. 439, allowing the same person to sue in two capacities in this Court, and that in *Bell et al.* v. *Hood et al.*, 90 Law Ed. 758, where the question was whether the court had jurisdiction of the suit by a person in two capacities seeking to recover damages for a violation of federal rights. If the suit could not have been brought by two plaintiffs, then the court had no jurisdiction to entertain it. So that the question directly presented and decided in *Bell et al.* v. *Hood et al.* involved the identical question here involved.

Appellees' point is that the Missouri court had no jurisdiction because, say appellees, it had no jurisdiction of a suit by two parties plaintiff jointly, and hence that the court properly dismissed the suit for that reason. But the same principle applied in *Bell et al.* v. *Hood et al.* would have resulted in dismissal for lack of jurisdiction.

But appellees have not once pointed out any distinction between the case at bar and *Picking et al.* v. *Pennsylvania R. Co. et al.*, 151 Fed. (2d) 240, reversing a trial

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court and holding that a husband and wife were jointly entitled to recover against Governor Dewey of New York, Governor James of Pennsylvania, the Pennsylvania Railroad Company and a state judge, and there alleged to be parties to the conspiracy there involved to deprive both plaintiffs of their federal rights by the same acts. Section 43, Title 8, was held to render all those defendants liable to the joint plaintiffs there. All that the appellees say with reference to the Picking case is (970):

> "The plaintiffs, husband and wife, in *Picking* v. *Pa. R. Co.*, 151 Fed. (2d) 240, upon which appellants rely, could not have maintained their suit in a Missouri state court under the foregoing applicable Missouri authorities."

In other words, appellees agree that appellants could recover on the federal statutes, R. S. U. S., Secs. 1979, 1980 and 1981, in any national court. But they say that they cannot "in a Missouri state court under the foregoing applicable Missouri authorities."

They have failed to take into consideration that Section 43 authorizes a recovery in an action at law, suit in equity or "other proper proceeding for redress." When the Congress inserted the words "proper proceeding for redress," did the Congress not intend that whatever might be a proper proceeding for redress in any national court would also be a proper proceeding for redress in any state court based on the federal laws?

Appellees have failed to call attention to the case of *Hague* v. *Committee for Industrial Organization*, 307 U. S. 496, same case 101 Fed. (2d), where it was held that numerous persons as plaintiffs in the same case were entitled to relief under Section 43, either at law or in equity, and get equitable relief as well as damages under

Section 43. Do not these circumstances establish the truth that the founding fathers intended that the provision of clause 2 of Article VI of the Constitution should apply in and govern the state court in this case? We reproduce that clause 2 of Article VI of the Constitution:

> "* * * This Constitution and the laws of the United States which shall be made in pursuance thereof, and all treaties made or which shall be made under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the Constitution or laws of any state to the contrary notwithstanding."

Appellees admit that appellant in both capacities could recover in a federal court on these federal statutes. They forget that a state court, in passing on federal statutes, is a federal court. Why should not the same rule apply in a state "federal court" that applies in a United States "federal court"? Must not the "supreme law of the land" be applied in the state federal court in an action based on federal statutes and the Constitution, regardless of what the state law may be? If not, are the state judges bound by the supreme law, or may they ignore the supreme law and do as the state court did herein—regard themselves bound by anything they suppose is contained in the laws of Missouri to the contrary?

The point to be determined in this case on this question is: Which law governs? Of course, the conclusion must be that the supreme law governs. For this Court has never permitted Missouri, or any other state, to deny federal rights to any person by virtue of any state law when it came in conflict with Federal Statute, Treaty or Constitution.

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In *Kring* v. *Missouri*, 107 U. S. 221, this Court said, l. c. 231:

> "The word *procedure*, as a law term, is not well understood, and is not found at all in Bouvier's Law Dictionary, the best work of the kind in this country."

It also declared that the word procedure is a modern word, and that constitutional or federal rights could not be wiped out by the State of Missouri by giving effect to a procedural law which would conflict with the supreme law, and reversed its decision. In other words, it said that, with reference to federal rights, there was no difference between procedural laws and substantive law. And, of course, there could not be under the impersonal and all-embracing command of the Constitution that "the judges in every state shall be bound thereby, anything in the Constitution or laws of any state to the contrary notwithstanding." Said impersonal and all-embracing command deprives every State Court and Judge of any power to write any exception into the fundamental law, and the exception written therein by the Missouri court in this case was not justified and necessitates reversal.

The only theory on which the contentions of appellees in their Point II could be sustained is upon the theory that we live under a system of government founded on an inversion of the first principles of government.

That is to say, on the theory that these United States are subordinate to the authority of Missouri. But Madison in his Federalist paper No. 44 points out that the supremacy clause of the Constitution does not permit such an application as appellees suggest of the supremacy clause above quoted. Madison said:

"A fifth class of provisions in favour of the federal authority, consists of the following restrictions on the authority of the several states.

• • • • • • •

'This constitution, and the laws of the United States which shall be made in pursuance thereof, and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land, and the judges in every state shall be bound thereby, anything in the constitution or laws of any state to the contrary notwithstanding.'

The indirect zeal of the adversaries to the constitution, has betrayed them into an attack on this part of it also, without which it would have been evidently and radically defective. To be fully sensible of this, we need only suppose for a moment, that the supremacy of the state constitutions had been left complete, by a saving clause in their favour.

In the first place, as these constitutions invest the state legislatures with absolute sovereignty, in all cases not excepted by the existing articles of confederation, all the authorities contained in the proposed constitution, so far as they exceed those enumerated in the confederation, would have been annulled, and the new congress would have been reduced to the same impotent condition with their predecessors.

In the next place, as the constitutions of some of the states do not even expressly and fully recognize the existing powers of the confederacy, an express saving of the supremacy of the former would, in such states, have brought into question every power contained in the proposed constitution.

In the third place, as the constitutions of the states differ from each other, it might happen that a treaty or national law of great and equal importance to the states, would interfere with some, and not with other constitutions, and would consequently be valid in some of the states, at the same time that it would have no effect in others.

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> In fine, the world would have seen for the first time, a system of government founded on an inversion of the fundamental principles of all government; it would have seen the authority of the whole society everywhere subordinate to the authority of the parts; it would have seen a monster, in which the head was under the direction of the members."

This Court, in *Brown* v. *Walker*, 161 U. S. 591, in discussing an Act of Congress prohibiting prosecution, penalty or forfeiture for or on account of any transaction, matter or thing concerning which a person might testify or produce evidence "was a rule of procedure which was binding in the courts of any State." It points out that, while the Constitution does not operate upon a witness testifying in the state courts, yet l. c. 606:

> "There is no such restriction, however, upon the applicability of Federal statutes. The 6th article of the Constitution declares that 'this Constitution, and the laws of the United States which shall be made in pursuance thereof, and all treaties made or which shall be made under the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the Constitution or laws of any state to the contrary notwithstanding.'
>
> The language of this article is so direct and explicit that but few cases have arisen where this court has been called upon to interpret it, or to determine its applicability to state courts."

The court then called attention to other decisions dealing with procedure concerning federal rights in state courts, and then said, l. c. 607:

> "The act in question contains no suggestion that it is to be applied only to the Federal courts."

And after further discussion concluded, l. c. 608:

> "* * * but the immunity extends to any *transaction, matter, or thing* concerning which he may testify, which clearly indicates that the immunity is intended to be general and to be applicable whenever *and in whatever court* such prosecution may be had."

The appellees claim that the state courts, both trial and Supreme, decided no federal question, except that Section 948 was not a bill of attainder. But the State Supreme Court points out (820):

> "Appellants claim error under twenty-two numbered assignments, some being mainly a repetition of others. We have considered all of these assignments, but see no useful purpose in discussing each one separately."

Appellants properly presented all the federal questions appearing in the assignments of error so mentioned by the state court.

Appellees' said claim is tantamount to an accusation that the judges of the Supreme Court of Missouri did not do their duty and decide the federal questions which were properly presented for their decision under the state law. Had the State Supreme Court failed to decide such questions, then such failure, under the decision of this Court in *State ex rel. Lawrence* v. *State Tax Commission*, 286 U. S. 276, would be a denial of the rights secured to them by Section 1 of the XIVth Amendment.

Appellees contend that instead of the Constitution meaning what Madison says and what this Court has said, that it really means that the Constitution and the laws of Missouri shall be the supreme law of the land in every case on which a federal right is based and that the judges

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of the nation shall be bound by the law of Missouri, anything in the laws or treaties or the Constitution of the United States to the contrary notwithstanding.

The contention of appellees in their Point II (968-974) might be appropriate under the old Confederation, for there no "supreme law provision" restricted the judges of the states, but it cannot avail here.

V.

However, the state law did authorize appellants to maintain the instant action jointly. Sections 856, 857 and 858, R. S. Mo. 1939, are as follows:

"Sec. 856. Whenever a cause of action has accrued under or by virtue of the laws of any other state or territory, such cause of action may be brought in any of the courts of this state, by the person *or persons* entitled to the proceeds of such cause of action: *Provided,* such person or persons shall be authorized to bring such action by the laws of the state or territory where the cause of action accrued.

"Sec. 857. Whenever any cause of action has accrued under or by virtue of the laws of any other state or territory, and the person or persons entitled to the benefit of such cause of action are not authorized by the laws of such state or territory to prosecute such action in his, her or their own names, then, in every such case, such cause of action may be brought and prosecuted in any court in this state by the person *or persons* authorized under the laws of such state or territory to sue in such cases. Such suits may be brought and maintained by the executor, administrator, guardian, guardian *ad litem,* or any other person empowered by the laws of such state or territory to sue in a representative capacity.

"Sec. 858. The proceeds of any action brought under section number 857 of this article shall be distributed by the person bringing such suit, and

paid to the person or persons entitled thereto, according to their respective interests therein, under the laws of the state or territory wherein the cause of action arose."

In *Shaw* v. *Railroad*, 314 Mo. 123, at l. c. 130, it is said:

"• • • where a cause of action is given by the Federal Government, and made enforceable in the state courts, as are cases under the Employers' Liability Act, such a law is not one of a foreign country, but is one which fairly comes within the terms of Section 1163, Revised Statutes 1919, relative to our practice in this State. It is a part of the law in every State. (See also *State ex rel.* v. *Hoffman*, 274 S. W. 362.)"

Section 1113, R. S. 1919, is a duplicate of Section 857, R. S. Mo. 1939.

In *Bright* v. *Wheelock*, 323 Mo. 840, the court held that said sections were mandatory and compelled a Missouri court to assume jurisdiction of cases arising under the federal law, regardless of the decision of this Court in *Douglass* v. *Railroad*, 279 U. S. 377. And, after pointing out that this Court there held that there was no obligation on the New York state court to entertain a suit arising under said federal law in another state, yet the Missouri court said, l. c. 876:

"However, our own court has not construed the (somewhat similar) statutes of this state (Secs. 1163, 1180, R. S. 1919) to invest the courts of this state with the discretion to refuse to entertain jurisdiction of such a suit. Our previous rulings, as announced in the Shaw, Wells and Foraker cases, *supra*, appear to be to the effect that the statutes, *supra*, do not invest the courts of our state with such discretion, and we see no good or sufficient reason for overrul-

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ing, at this time, our prior decisions construing such statutes. It would seem to us that the correction of the evil (herein complained of by respondents), if there be any evil, lies with the Legislature rather than with the Judiciary."

Section 1163, R. S. 1919, above referred to is a duplicate of Section 857, R. S. Mo. ~~1919~~ 1939.

See also *Hotchkiss* v. *Ogle*, 153 Kan. 156, l. c. 162, where it is said:

"It is argued, also, that there was a misjoinder of parties plaintiff. The petition frankly alleged the action was brought for the benefit of heirs, that one of them had joined as plaintiff, and she made no claim to the entire estate but only to her distributive share as an heir. Such procedure is authorized (G. S. 1935, 60-410, 60-412). There was no conflict in the relative purposes of the plaintiffs. The joinder of plaintiffs here did not prevent defendants from making their defense, nor otherwise operate to their prejudice. (*Sentney* v. *Commercial National Bank*, 128 Kan. 107, 275 Pac. 1081; *Phoenix Mutual Life Ins. Co.* v. *Nevitt*, 147 Kan. 772, 78 Pac. (2d) 913.)"

Sections 60-410 and 60-412, R. S. Kan. 1935, are duplicates of Sections 850 and 851, R. S. Mo. 1939.

Under Sections 850 and 851, R. S. Mo. 1939, it is held that an heir and administrator can join as parties plaintiff, just as the Missouri court has held, throughout the years, in *Butler* v. *Lawson*, 72 Mo. 227, and as the Missouri Supreme Court recently held, *en banc*, in *Young* v. *Boatmen's National Bank*, 171 S. W. (2d), l. c. 563:

"Respondents have cited several cases holding that where real and personal interests are intermingled and involved in the same suit, the administrator may

bring, defend or join in the action. They are: *Butler* v. *Lawson*, 72 Mo. 227, 247-8; *Bacon* v. *De Armond*, *supra*, 226 Mo. App., loc. cits. 626, 627, 47 S. W. (2d), loc. cit. 215 (9); *Parker* v. *Simpson*, 180 Mass. 334, 341 (2), 62 N. E. 401, 403 (2)."

Syllabus 22 of the same case reads:

"Where intestate's real and personal interests are intermingled, in the same suit, the administrator may bring, defend, or join in the action."

Section 851, R. S. Mo. 1939, is:

"Sec. 851. All persons having an interest in the subject of the action, and in obtaining the relief demanded, may be joined as plaintiffs, except as otherwise provided in this article."

There is no provision otherwise in the article.

Sections 850 and 851 were applied by the court in *Butler* v. *Lawson*, 72 Mo. 227, and have been applied throughout the years in support of the proposition that there may be a joinder in Missouri of parties plaintiff under the circumstances here involved. See *McLain* v. *Atlas Assur. Co.*, 67 S. W. (2d) 849.

The foregoing, with reference to the state law, is included, not for the purpose of showing that a federal question is in this case, but for the purpose of demonstrating that the decision of the state court is not based upon an adequate state ground broad enough to support it.

And in any event, in view of the fact that Judge Ridge was without jurisdiction to rule on the demurrers in violation of Rule 29 (402-403), or sustain appellees' motions included in the alleged demurrers without one day's notice under Section 965, R. S. Mo. 1939; and in view of

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the fact that Sections 948 and 922, R. S. Mo. 1939, were ineffective ~~to accomplish that which appellees sought to accomplish on December 30, 1941,~~ four hours after they had accomplished the result they sought, under the new code which came into existence on the following court day, prohibited the filing of demurrers and prohibited the dismissal of actions on the ground or cause on which Judge Ridge based his ruling, and based his application, without notice, trial or hearing on Section 948. Par. 18 of Motion for Rehearing and to transfer to court, *en banc* (843-844), disclose that in Missouri and every other state with a like code provision as to demurrers, a demurrer for misjoinder of parties does not lie.

The statement of appellees on page 19 of their suggestions (968) that

> "All that the Supreme Court of Missouri has decided, in the instant case, is that under the applicable law appellants had no right to maintain *jointly* the instant suit"

contradicts the Supreme Court of Missouri because its opinion refers to the 22 assignments of error (820), saying "We have considered all of these assignments" (820). On the same page they say:

> "The ground of failure to state a cause of action as sustained by the opinion quoted, thus relates solely to the failure to state a cause of action in favor of plaintiffs jointly. *Fadler* v. *Gabbert*, 333 Mo. 851, l. c. 863, 63 S. W. (2d) 121, l. c. 127; *Akins* v. *Hicks*, 109 Mo. App. 95, l. c. 99, 83 S. W. 75, l. c. 76."

Said decisions are based on an erroneous statement of the alleged law of New York as set forth in *Brownson and Wife* v. *Gifford*, 8 How. Pr. 389, cited in support of the text of *Barbour on Pleadings to Actions*, 459—referred

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to in said cases in support of the erroneous doctrine on which Commerce Trust Company relies.

In *Akins* v. *Hicks*, 109 Mo. App. 95, l. c. 99, the Kansas City Court of Appeals recognized that the statute, Section 922, did not provide that misjoinder should be a cause for demurrer, saying:

> "By Section 589, Revised Statutes 1899, a defect of parties is a good ground of demurrer but it does not provide in terms that a misjoinder shall be cause for demurrer. And it has been held that, 'where there is a misjoinder of plaintiffs a demurrer will lie not solely on account of the misjoinder but because in such a case the complaint does not state a cause of action in favor of the plaintiff.' *Barbour on Pleadings to Actions* (2 Ed.) 459. The distinction, however, is technical and immaterial under our practice, as a failure of the pleadings to state a cause of action is, as a matter of course, a good ground for demurrer."

In *Fadler* v. *Gabbert*, 333 Mo. 851, l. c. 863, ~~this~~ the Court discussed the question as follows:

> "(1) I. *Misjoinder.* By way of preliminary observation, we may say that a defect of parties plaintiff means too few parties and hence is not synonymous with misjoinder of parties which means an excess of parties, one of the grounds of complaint here (31 Cyc. 284). We may also note that Section 770, Mo. Statutes Annotated 1929, makes a defect of parties cause for demurrer, but does not in terms make misjoinder a cause. However, a misjoinder of parties plaintiff is ground for demurrer for the reason that in such case the petition does not state a cause of action. (*Akins* v. *Hicks*, (Mo. App.) 83 S. W. 75; *Barbour on Pleadings to Actions* (2 Ed.) 459.)"

It thus appears that the Missouri courts there recognized that Section 922 does not make misjoinder a ground

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of demurrer. But the reasoning in *Akins* v. *Hicks*, followed by ~~this~~ the *Court*, was based on the text of *Barbour on Pleadings to Actions*, 2d Ed. 459. That work was published in Albany, New York, and was dealing with pleadings in that State. Mr. Barbour cites two cases in support of his text: *Walworth* v. *Handy*, 24 How. Pr. 323, and *Martin and Wife* v. *Marsh*, 21 How. 372. *Walworth* v. *Handy* was decided at the February Special Term, 1863, and followed the opinion of the Supreme Court in General Term in *Martin and Wife* v. *Marsh, supra.*

In *Walworth* v. *Handy*, the wife and her husband were parties plaintiff. The wife's alleged right was an incohoate right of dower through her husband in the lands devised to him under the will. Said the court:

> "Borbour on Pleadings cited *Walworth* v. *Handy*, 24 How. Pr. 353, at the Saratoga Special Term. That was a case to construe a will. The wife had an incohoate right of dower through her husband and this right attached to the lands to which he was entitled by the will. Said the Court:
>
> > 'It seems plain that the wife of Wm. Walworth was an unnecessary party plaintiff.'
>
> * * * * * * *
>
> "* * * it has been said that a demurrer must be sustained or fail to the whole extent to which it is applied; and that where a demurrer is to the whole complaint, if one of the plaintiffs might have had judgment separately, it is bad. *But in Brownson and Wife* v. *Gifford*, (8 How. 389) *it was held on demurrer that the action should have been brought by Mrs. Brownson alone and that her husband was improperly joined as plaintiff.*"

It then proceeded to hold that unless both plaintiffs were entitled to recover, neither was, saying:

> "* * * when two or more plaintiffs unite in bringing a joint cause of action, and the facts do not show

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> a joint cause of action in them, a demurrer will lie upon the ground that the complaint does not state facts sufficient to constitute a cause of action,"

following *Martin and Wife* v. *Marsh*, 35 Barb., 68 S. C., 21 How. 372. (February, 1863).

But the Court of Appeals for the State of New York, in *Palmer* v. *Davis*, at the March, 1863, term, *expressly disapproved of the decision in Brownson and Wife* v. *Gifford et al.*, l. c. 245, and correctly stated the applicable law demonstrating that the authorities cited by Mr. Barbour in support of his text, and consequently the text referred to by ~~this~~ the Court in the *Fadler* v. *Gabbert* case, and the Court of Appeals in *Akins* v. *Hicks*, the allegations in the respondents' alleged demurrers as to misjoinder of parties plaintiff are without a legal basis on which to rest.

We direct the Court's attention to the quotation from the New York Court of Appeals in *Palmer* v. *Davis*, 28 N. Y. 242, wherein it expressly holds that *Brownson and Wife* v. *Gifford*, 8 How. Pr. 389, is wrong, using the following language:

> "The decisions, however, in *Brownson and Wife* v. *Gifford*, and others, sustaining the demurrer on the ground of a *defect* of parties, was undoubtedly wrong."

Whatever may be the rule with reference to alleged joint contracts, or to several contracts where there are more plaintiffs than one, yet with reference to the facts in this case the decisions on which appellees rely do not correctly declare the law, either of this State or of the State of New York .

That suggestion was treated (471-474) in appellants' suggestions in opposition to respondents' motion to strike. *Fadler* v. *Gabbert* and *Akins* v. *Hicks* made statements which were both obiter, and also shown by the foregoing authorities to be incorrect statements of the law. In other words, these casese were based on over-

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ruled New York law and are not now and never were Missouri law.

This Court may wonder why the Missouri court, notwithstanding the statute does not authorize a demurrer for misjoinder of parties, has continued to use the phrase "misjoinder of parties" with reference to demurrers. The greater portion of the early settlers of Missouri were profound common law lawyers. In *State* v. *Fry*, 4 Mo. 120, l. c. 176-177, the court said:

> "• • • We live in the midst of the common law, we inhale it at every breath, imbibe it at every pore, we meet it when we wake, and when we lie down to sleep, when we travel and when we stay at home; it is interwoven with the very idiom that e speak; and we cannot learn another system of laws, without learning at the same time another language."

The sons of the judges and lawyers who were thus so familiar with the common law imbibed it from their ancestors, and it has continued to this hour, so that some of the venerable lawyers who represent appellees, and some of the judges, as a part of their inheritance, are still saturated with the erroneous principles of the common law which the legislature long since discarded.

However, in the decided cases in Missouri, it will be found that where demurrers were sustained upon the ground of alleged misjoinder of parties the cases involve or dealt with actions on contract and really applied different principles from that known as misjoinder of parties. So that, if a suit were brought by two obligees when the pleaded contract disclosed that there was only one, then a demurrer upon the alleged ground of misjoinder of parties plaintiff would be sustained, whereas the real question involved was not a question of pleading but a question of substantive law. Rulings that two alleged obligees could not recover upon a contract where only one of them was an obligee are sometimes referred to as rulings on the ground of misjoinder of jarties whereas

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such ruling is on a question of substantive law to-wit, that a recovery cannot be had on a different case from that alleged. And this because the proof of the contract with one would not be proof of the contract with two, and to permit recovery would be to permit such litigants to sue on one contract or cause of action and recover on another. That principle has also sometimes been applied when two parties joined in a suit on two separate contracts, in which case the real ground for sustaining a demurrer is misjoinder of causes of action rather than misjoinder of parties.

The principle involved is well illustrated by the opinions in *State ex rel. Massman Construction Co.* v. *Shain*, 346 Mo. 1003, and *Scott* v. *Alton Banking Co.*, 175 S. W. 920.

Supplemented by *Walker* v. *Lewis*, 140 Mo. App. 26.

And, in any event, on this question of misjoinder of parties plaintiff, the Missouri law, as stated in *Drakopulos* v. *Biddle*, 288 Mo. 424, points out that appellees had no concern as to who were parties plaintiff in this case save and excepting that whoever prosecuted the action should be competent to maintain it in such a way as to bar any other action for the same injury. At l. c. 433 the court said:

> "The only concern of defendants as to parties plaintiff is that whoever prosecutes the action shall be competent to maintain it in such a way as to bar any other action for the same injury."

In the later case of *Webster* v. *Water Works Co.*, 352 Mo. 327, the court followed Drakopulos with approval in the year 1944.

VI.

Appellees say on their page 11 (960) that the penalty specified in Section 948 was "a compensation to the injured party." They cite countless inapplicable cases from

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this and other courts. Had they only looked at the case of *State ex rel. Crutcher* v. *Koeln*, 332 Mo. 1229, they would have found that the Supreme Court, *en banc*, in that recent case, settled the question against appellees by the following language, l. c. 1236:

> "'In their origin, costs were known as a *punishment* of the defeated person * * * rather than as a *recompense* to the successful party' * * * and today 'costs are included in the generic term penalty'."

Not only did the court thus apply the punishment to appellants, but it dismissed appellants' action which had been pending since August 22, 1941, and used the dying hours of the age-old statutes for an iniquitous and unjust purpose, to-wit: to deprive appellants of the benefit of the New Code in violation of her rights under the XIVth Amendment, which had accrued to appellants when the appellees filed their demurrers to the fifth amended petition as amended on December 30, 1944. Appellees indeed saw to it that under the judgment rendered appellants could not reinstate the suit. For under the decision in *Swing* v. *Furniture Company*, 150 Mo. App. 574, the judgment was a decision on the merits.

Appellants assigned error in the state court on that ground under assignments III (945) and XXII (948). While the court said they considered the assignments (820), they stated nothing in the opinion indicating that the judgment was not on the merits. We direct attention to the suggestions contained in the transcript filed by appellees, from which it appears that they made no such contention in the Supreme Court of the state, and this for reason that they knew that the judgment of the Circuit Court was a judgment on the merits under the Swing case,

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and they desired to be protected by the erroneous judg
ment in the future (854-856) (858-861).

But even if it could be held that the form of the judg
ment was not on the merits, yet the Supreme Court of th
state, by its decision and opinion, made it a judgmen
on the merits.

And then, since appellants' petition was based upon th
federal statutes, because of the denial of due process t
plaintiffs by the Kansas and Missouri courts, the findin
by the Missouri Supreme Court that "appellants hav
not been denied due process" (827) was a decision whic
forever protected appellees in all courts against an
further litigation by appellants in any capacity. And th
because the Supreme Court of Missouri has itself de
clared that its opinions are its decisions. See *Edwards*
Bell, 343 Mo. 824, l. c. 826.

The new constitution of 1945, which went into effe
after this case was appealed and pending on appeal i
the Supreme Court of the state, declared that the Suprem
Court was the highest court in the state and specifically
provided that "its decisions shall be controlling in a
other courts." (Article V, Sec. 2.) And so the decisio
of the State Supreme Court in affirming the judgment
the Circuit Court, and in specifically making the findin
it did, was more of a bill of pains and penalties than th
decision of the trial court. And together they punishe
and destroyed appellants by forever preventing recover
for the violation of her federal rights set forth in th
fifth amended petition as amended, and in the assignmen
of error in this Court (934-940).

Beginning on page 46 and continued to page 60 (99
1009) of their suggestions in opposition to jurisdictio
appellees tell this Court what the records show, and th
notwithstanding the records to which they refer are n

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part of this case. Said discussion merely amounts to a claim that appellees have a defense, which, of course, should properly be pleaded in an answer.

VII.

On pages 61-66, inclusive (1010-1015), appellees indulge in a dissertation with reference to the judicial notice which this Court will take of its records.

We have no quarrel therewith, for the reason that none of those records disclose anything which militates against appellants' rights to recover on the pleaded cause of action.

They call attention to orders of this Court denying applications for certiorari, which, of course, were not on the merits, and decided nothing.

VIII.

On page 67 (1016) appellees sedulously omit to call attention to the fact that only one issue was tried in the Howard fee case, 345 Mo. 741-751, and the basis, as appears in the premises, was that Commerce Trust Company and appellee Howard unlawfully represented conflicting interests. The obligation to determine the question of *res judicata* ~~rested~~ rests on the trial court, when the case is tried, to apply the law to the pleaded facts insofar as supported by evidence on that question as on every other.

In thus failing to apply the doctrine of *res judicata*, the court failed to accord to appellants the protection of the laws of the state, for the judgment in that case reversing the decision and directing that no fee be paid to appellee Howard by Commerce Trust Company from Moffett Brothers' assets was because both Howard and

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Commerce Trust Company unlawfully represented co
flicting interests. And the finding as to the premises w
as conclusive as the judgment in the Missouri State cou
as appears from the statement made in *Dickey* v. *Hei*
48 Mo. App. 114, where the court said, l. c. 120:

> "'A verdict and judgment are conclusive by w
> of estoppel only as to those facts which were nec
> sarily involved in them, without the existence, pro
> or admission of which such a verdict and judgme
> could not have been rendered.' *It is denominated*
> *reasoning backward from the judgment to the ba*
> *on which it stands,' 'upon the obvious principle th*
> *where a conclusion is indisputable and could ha*
> *been drawn only from certain premises the premi*
> *are equally indisputable with the conclusion'.*"

This principle is embodied in the *en banc* opinion
State ex inf McKittrick v. *Missouri Public Service Cor*
ration, 351 Mo. 961, where, at page 973, citing *Dickey*
Heim, supra, as authority, the universal law on this qu
tion is stated as follows:

> "A judgment is conclusive in a subsequent acti
> between the same parties on the same cause of acti
> of all matters which might have been litigated there
> but where the causes of action are different, ev
> where the parties are the same, it is only conclusi
> of matters which were in fact litigated therein."

IX.

The error of the court in denying appellants' right
the equal protection of the laws under the XIVth Amen
ment was raised as soon as it could be, to-wit: after t
Supreme Court failed to give *res judicata* effect to t
said premises, in the petition for rehearing and to tra
fer to the court *en banc* (837).

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On page 71 (1020) appellees claim that the Supreme Court did not hold that the petition did not state a cause of action. We refer this Court to the opinion of the state court (819-827).

Under Point IX (1021) appellees claim that they never admitted, in any manner in any place, that the acts of Judge Hay were corrupt. But the third amended petition (62-135), at the request of appellees (429) is embodied in the record herein. At no place therein did it use the adjective "corrupt" or "corruption." It merely stated what the Kansas district judge had done. Extracts from their brief are in the record at pages 299-306 and show what their language was. So that, by their demurrers, they admitted the truth of the allegations in the third amended petition, and by their briefs they expressly stated that charges admitted by them to be true by their demurrers in the third amended petition concerning the Kansas judge, consisting of the allegations of fact, were allegations of admitted facts which warranted their solemn admission that said judge was "corrupt" and his court "corrupt."

We respectfully submit that appellees' denials on their page 72 of their suggestions (1021) that they did not so admit is a question to be tried by the trial court, and their demurrers to the fifth amended petition, admitted that under the facts alleged, the Kansas district judge was "corrupt."

X.

On pages 80 to 83, inclusive, of appellees' discussion (1029-1032) they refer to the "Comanche case."

By their demurrers they admit the truth of the allegations in the petition as to that case, and if there be records to show what they indicate, then, of course, they can

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offer same. But this is an inappropriate place to c
same, especially since their statements are incorrect.
instance, on page 82 (1031) they say:

> "The attorneys in the instant case were the s
> attorneys who tried the case before Judge Carl
> ler in the District Court of Comanche County."

The writer hereof was never in that court.

It is rather inappropriate to show that this Court
no jurisdiction to make statements resting solely in
imagination of appellees, with reference to wholly
material facts.

But they further say that certain pages of docum
in connection with certiorari show that the exact d
ments complained of on their petition had been introd
in evidence by them at the trial of the case in Coma
County, Kansas. This flagrant error warrants the
clusion that appellees have no substantial objection to
jurisdiction of this Court, for it appears from their d
ments that a copy which Mr. Watson attempted to in
duce was not received in evidence because of extr
fraud of appellees.

XI.

The claim is made in appellees' Point XI, on pages
87, inclusive (1033-1036), that the institution and ma
nance of the fictitious suits for $2,539,366.80 (268) for
teen years in the state courts did not deprive appel
of any federal rights so as to vest jurisdiction in
Court. But they admit the allegation that they unlaw
deprived appellants of their property thereby in viol
of the XIVth Amendment.

The allegations with reference to the fictitious suit

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covered by the principles stated in 12 C. J., Sec. 110, at page 588, as follows:

> "Sec. 110. Conspiracy to Use Legal Proceedings Fraudulently to Injure Another. Where parties, in pursuance of a conspiracy or combination for that purpose, fraudulently make use of legal proceedings to injure another, an action lies against them, at the suit of the person injured, to recover damages sustained. And the fact that a combination for fraud has been brought to a successful end by false testimony produced on the trial does not make an action for conspiracy obnoxious to the rule that there can be no civil action for perjury or subordination of perjury."

These fictitious suits, instituted for the purpose of unlawfully keeping the cases on the dockets, and to prevent appellants from having their properties distributed to them, was an unlawful use of the courts to deprive appellants of their property, without due process of law, throughout all of these years, and to deny them the equal protection of the laws, and to breach their privileges and immunities under the United States Constitution and Laws, and admit that appellants' (322)

> "• • • overt acts, pursuant to said conspiracy, deprived them of the natural rights to the enjoyment of said gains of their own industry, and, as to them, frustrated the purpose of all constitutional government, and thereby caused the government to fail of its chief design and to obliterate all constitutional government as to said rights of this plaintiff, and caused the states aforesaid to ignore plaintiff's privileges and immunities as a citizen of the United States, and her right not to be deprived of said property without due process of law, and denied the equal protection of the laws and of those rights secured

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by Section 2 of Article IV and of Section 1 of the XIVth Amendment to the Constitution of the United States."

They say at page 84 (1033) the fourteen fictitious suits were all pending at the time this petition was filed. They say, on page 85 (1034):

> "• • • that by reason of the disposition adverse to appellants of many of these alleged fictitious suits, there are only a few remaining to be tried."

Only one of the fictitious suits so instituted was tried in the district court of Harper County, Kansas. They also say that appellants have a complete remedy, citing *Guhman* v. *Grothe*, 346 Mo. 427. It appears from the petition that appellants have unsuccessfully endeavored to obtain such remedy in the state court (297-298), which refused to apply *Guhman* v. *Grothe, supra.* The state courts refused to do anything to relieve appellants (298) from this awful burden.

It is held in Missouri that the institution of fictitious suits, in and of themselves, renders the attorney and client liable, whose acts in bringing said suits occasion damage. (*White* v. *McCoy Land Co.*, 87 S. W. (2d) 672, 229 Mo. App. 1019; *White* v. *Scarritt*, 341 Mo. 1004; *White* v. *McCoy Land Co.*, 101 S. W. (2d) 763.

XII.

In their Point XII (1037-1039), appellees say that appellants

> "• • • are completely in error in the contention that there is a right of action for conspiracy alone."

Appellants never made any such contention.

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XIII.

In their Point XIII at pages 91 to 95, inclusive (1040-1044), appellees admit the overt libelous act pursuant to the alleged conspiracy, but they do not quote the part of the petition that states where the libelous statements were published.

The petition itself discloses and their demurrers admit that the said statements were made in briefs filed by appellees' counsel in the court wherein the case was pending in support of their demurrers, admitting the truth of said petition, and by which briefs said appellees convinced the court that the truth which they admitted by the demurrers was untrue in their briefs.

This was not an action for libel, but, as they admit, an additional overt act pursuant to the conspiracy. And, as appellant had the absolute right to select the law under which she would proceed (*Bell et al.* v. *Hood et al.*, 90 Law Ed. 758-762, her petition charged that the libelous brief was an overt act pursuant to the conspiracy and not a mere separate cause of action for libel, but an incident and link in the conspiracy (*Truax* v. *Corrigan*, 257 U. S. 312).

XIV.

Point XIV in appellees' pages 96 to 99 (1045-1048), asserts that the special judges were *de facto* judges. That they were not is demonstrated by the Missouri statute adopting the common law of England, except insofar as not in conflict with the state or United States Constitution, or any statute.

And since the *de facto* rule is a common law rule, its application in this case was in conflict with the express

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No. 318.

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In the Supreme Court of the United States

October Term.

LOUISE McGREW MOFFETT and LOUISE McGREW MOFFETT as Executrix of the Estate of Thomas S. Moffett, Deceased, *Appellants,*

vs.

COMMERCE TRUST COMPANY, a Corporation, HELEN WEEDE, B. C. HOWARD and WILLIAM H. KOPP, *Appellees.*

RESPONSE TO "MOTION OF APPELLEES TO STRIKE ALL OR CERTAIN PARTS OF APPELLANTS' DESIGNATION OF POINTS ON WHICH THEY INTEND TO RELY"

and

APPELLANTS' REQUEST FOR A FULL HEARING ON THE MERITS.

A. E. WATSON,
MARTIN J. O'DONNELL,
Attorneys for Appellants.

SMITH-GRIEVES LAW PRINTERS, KANSAS CITY, MO.

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Said motion is evidently directed to appellants' Statement of Points.

Appellees seem to be so obsessed with the alleged principle of Misjoinder that they contend that it applies to Mrs. Moffett in both capacities, and that it also applies to the papers filed by her for use in more than one capacity. In other words, appellees are relying upon the alleged and novel principle of *misjoinder of papers*. That is, they contend that the assignment of errors, which appellants have adopted as part of their points to be relied on, cannot perform more than one function. And this singular contention is thus made, although adoption of the assignment of errors as a statement of points to be relied upon is a practice long recognized by this Court as appropriate. Robertson and Kirkham, in their Jurisdiction of the Supreme Court of the United States, Section 364, page 752, say:

> "Where counsel are satisfied with the assignment of errors, it is a common practice to file a statement adopting the assignment of errors as the statement of points required by Rule 13."

This Court in *Flournoy* v. *Wiener*, 321 U. S. 253, and *Herb* v. *Pitcairn*, 324 U. S. 117, cite Robertson and Kirkham on Jurisdiction as authority.

Appellees attempt to eliminate appellants' statement of points by referring to them as assignments of error and contending that Points I and II, supplementing the assignment of errors, should have been filed in the Supreme Court of Missouri. Points I and II are not additional assignments of error and there is no rule requiring the statement of points to be relied upon to be filed in the lower court. On the contrary, said rule requires that the statement of points be filed with the clerk of this Court, as they were.

Appellees' real complaint is that appellants did not file two papers instead of one, setting forth the same points.

Appellants' statement of points was made in the spirit of the rules of this Court requiring brief statements and limitation of repetition. It is respectfully suggested that the appellate jurisdiction which the Constitution requires this Court to exercise should not be defeated on any such tenuous ground.

Appellees profess not to waive or abandon their motion to dismiss or affirm or to prejudice the hearing and disposal thereof by their motion to strike. But, nevertheless, they have urged that this Court has no jurisdiction to do anything in this case but to dismiss it. And yet they invoke the jurisdiction they say does not exist in this case to strike what they erroneously describe as the "designation of points on which they (appellants) intend to rely"!

Appellants strictly complied with the provision of paragraph 9 of Rule 13 by filing a Statement of the points on which appellants intend to rely, and not a "designation" thereof as appellees assert.

The claims in the motion and especially the following:

> "2. That part of said designation entitled 'Assignment of Errors' (subdivided as parts I and II) should be stricken for the reason that said assignments were not filed with the clerk of the Supreme Court of Missouri at the time of filing of and accompanying appellants' petition for appeal as required by rule 9 of this Court, but such designation constitutes an attempt to add additional assignments of error after the time provided by said rule and in violation thereof."

are occasioned by appellees' attempt to eliminate from consideration the opening sentence:

> "Come appellants in the above entitled cause and adopt their Assignment of Errors in this Court, sup-

plemented by the following numbered Points I and II, as their statement of points to be relied upon; * * *"

A similar act of a party in omitting a part of a sentence offered in evidence and refusing to read all of it, was thus condemned in *Bompart* v. *Lucas,* 32 Mo. 123, l. c. 124:

> "At the trial of this case, the plaintiff offered in evidence a portion of a sentence of the answer of Lucas in the previous case, and refused to read the remainder of the sentence which materially qualified the effect of the portion read, and the court refused to compel him to read the remainder. This was manifestly wrong; and is only equalled by the case of the infidel who undertook to prove from the Scriptures the want of a deity by reading the words 'there is no God,' and omitting the preceding words, 'the fool hath said in his heart'."

From the physical fact that appellees have devoted 100 pages to debating the questions raised by the assignment of errors in their suggestions opposing jurisdiction, and extraneous questions, and in which they have discussed all of said assignments excepting Nos. 17, 19, 21, 23, 24 and 30, it would seem that appellees are asking this Court to do that which it has itself decided it is without jurisdiction to do.

Appellees set out the numbers of the assignments (now adopted as a part of appellants' statement of points) they discuss on the following pages of the certified transcript of the record:

Transcript Pages	Assignments of Error (Points)
956 to 967	14, 15, 18
968 to 974	20, 33, 34
975 to 979	16
980 to 988	22
989 to 994	37
1010 to 1015	1 to 13 and 25, 27, 28, 29, 32, 35 and 36
1020 to 1028	1
1033 to 1036	26
1037 to 1039	10, 11, 12, 13, 18, 26 and 31

The assignments excepted from discussion are more definite and certain than those they have discussed, but they can offer nothing to palliate the errors there specified.

It would seem that if the assignment of errors were sufficiently certain and definite to provoke 100 pages of discussion from appellees on the merits thereof in their said suggestions, they cannot very well, with good faith, claim that they are not sufficiently definite to enable them to do that which they have done at such length and futility, or that they are not sufficiently definite to enable appellees to discuss same in their brief when adopted as part of appellants' "statement of points to be relied upon."

Appellees' position is that they can discuss them as assignments of error but cannot discuss them as points!

Appellees seem to think that, whether or not this Court has jurisdiction on appeal depends on its discretion and not upon the Constitution and law. But throughout the years this Court has ruled to the contrary. In *Cohens* v. *Virginia*, 6 Wheat, it is said, l. c. 404:

> "It is most true that this court will not take jurisdiction when it should not; but it is equally true that it must take jurisdiction if it should."

That principle, as applied to this case, is reiterated in *Memphis Natural Gas Co.* v. *Beeler*, 315 U. S. 649, where it is said, l. c. 651:

> "The Judicial Code was intended to restrict our obligatory appellate jurisdiction to a narrow class of cases, and to foreclose an appeal as of right whenever the prescribed conditions have not been rigorously fulfilled."

These decisions recognize the obligatory effect of the constitutional provision, as it applies to this case, in Section 2 of Article III, providing that

> "In all the other cases before mentioned the Supreme Court shall have appellate jurisdiction, both as to law and fact, with such exceptions and under such regulations as the Congress shall make."

As this case involves the validity of federal and state statutes in the way specified in Section 237, Judicial Code, the obligatory appellate jurisdiction conferred by the Constitution, as it applies to this case, has never been changed. Sec. 237, Judicial Code, provides:

> "A final judgment or decree in any suit in the highest court of a state in which a decision in the suit could be had, where is drawn in question the validity of a treaty or statute of the United States, and the decision is against its validity; or where is drawn in question the validity of a statute of any state, on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity, may be reviewed by the Supreme Court upon a writ of error."

For the words "writ of error" the Congress in 1928 substituted the word *appeal*.

The jurisdictional statement and the record disclose that the validity of Sections 1979, 1980 and 1981, U. S. R. S., was drawn in question by the demurrers of the appellees, and that the judgment of the State Supreme Court holding that appellant's pleading disclosed that she was not denied due process and hence failed to state a cause of action was a decision holding said acts of Congress invalid under the rule applied in *United States* v. *Sutton*, 215 U. S. 291.

It is also shown by the record that the validity of statutes of Missouri, on the ground of their being repugnant to the Constitution, a treaty and laws of the United States was drawn in question, and that the state court's decision was in favor of the validity of said statutes. And especially does this appear from the passage of the opinion of the State Supreme Court wherein it explicitly stated that appellants questioned the validity of Section 948, R. S. Mo. 1939, on the ground of conflict with the Constitution, and the opinion discloses that the State Supreme Court expressly held that said statute was not repugnant to the Constitution and that it was valid (826). Thus:

> "Appellants say that Section 948 * * * violates Article 1, Section 10, of the Federal Constitution, which prohibits a state from passing a bill of attainder. * * * It does not resemble a 'bill of attainder' or of 'pains and penalties.' * * * It applies only to civil procedure, inflicts no penalty without a hearing, authorizes neither fine nor imprisonment, but only a money judgment for unreasonably consuming the time of courts and litigants and causing needless expense by filing defective petitions."

The fact and the law that

> "The power, * * * to dismiss because of the want of substantiality in the claim upon which the assertion of jurisdiction is predicated, *does not apply to cases where the subject matter of the controversy is per se and inherently Federal.*" (*Equitable Life Ass'n Soc.* v. *Brown*, 187 U. S. 308, l. c. 311, citing *Swafford* v. *Templeton*, 185 U. S. 487, 493),

has caused appellees to abandon their claim that this Court has no jurisdiction of this case. And they now resort to a belated complaint of the "Assignment of Errors" and the "Statement of Points," and urge that they are so vague and indefinite that they cannot understand them and therefore cannot possibly engage in a debate with reference thereto. But said contention is contradicted by the physical fact that appellees have devoted the greater portion of their 100-page debate entitled, "Suggestions Opposing Jurisdiction," to the solemn debate of said "Assignments of Error," and under the time-honored "physical fact" rule establishes the invalidity of said contention.

Even if this Court could apply the test applicable to a case which could be dismissed for the want of a substantial federal question to appellees' latest belated complaint, that test would necessitate the denial of their motion to strike. That test is that unless this Court is able

> "to say that every question that appellants have brought here for decision *is so clearly not debatable* and utterly lacking in merit as to require dismissal for want of substance" (*Hamilton* v. *University of California*, 293 U. S. 245, l. c. 258)

the motion cannot be sustained. But appellees' extensive debate of said assignments destroys their contention that

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is is impossible for them to debate that which they have so laboriously and extensively debated. Their futile debate merely establishes appellants' right to have this Court exercise its jurisdiction and reverse the judgment of the Missouri Supreme Court.

The foregoing demonstrates that the motion to dismiss or affirm cannot be sustained. For, having jurisdiction, the Court cannot decide the issues without a full hearing on the merits, especially when such hearing is requested.

Appellees' response to the citation informs this Court that if it determine that it has jurisdiction

> "• • • appellees desire to file briefs and to be heard before the Court at the times and in the manner provided by the rules of the Court."

The above is equivalent to a demand by appellees of their constitutional right to file briefs and to be heard before the Court, if it determines that it has jurisdiction.

The jurisdiction of the state court on appeal from the judgment rendered after sustaining demurrers is pointed out in *Graves* v. *Graves*, 255 Mo. 468, l. c. 480, as follows:

> "We can only consider the allegations of the petition and the demurrer."

That court could not consider the opinions and exhibits attached to their suggestions opposing jurisdiction (1050-1062). In *Graves* v. *Graves* the Missouri Supreme Court, in refusing to consider questions not appearing from the petition and the demurrer, said, l. c. 479:

> "This matter cannot be considered here. This case stands here upon a demurrer to the plaintiff's petition. • • • We must adhere to the allegations of the petition here. If it states facts for relief, we must

sustain it, although outside of the record before us there may be other facts detrimental to plaintiff's cause of action. These matters might be raised by answer, but not by general demurrer."

In *Stewart* v. *Masterson,* 131 U. S. 151, this Court said, l. c. 158:

> "It is very clear that the present demurrer introduces as its support new facts which do not appear on the face of the bill, and which must be set up by plea or answer."

In *Pacific R. R. of Mo.* v. *Mo. Pacific R. Co.,* 111 U. S. 505, at l. c. 518, this Court said:

> "We are of opinion that this court cannot consider anything which is not contained in the bill and the exhibits which are annexed to it, and that it cannot look into anything otherwise presented as the files and records of the Ketchum suit, or of any other proceedings in any court, for the purpose of determining the questions arising on the demurrers to this bill."

Opinions by courts of other jurisdictions cannot be considered by the Missouri courts under the state of the record. (*Friedman* v. *Maryland Casualty Co.,* 228 Mo. App. 680.)

Neither could the Missouri court, by virtue of the device known as judicial notice, referred to in their suggestions (1010-1015), consider said opinions under the law as declared in *State ex rel. Eastin,* 270 Mo. 193, l. c. 210:

> "We take notice of a former appeal and of the record thereof (*Keaton* v. *Jorndt,* 259 Mo. 179); but we do not notice the facts and records in one action when called on to rule another and separate one

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(*Spurlock* v. *Railroad*, 76 Mo. 67; *Banks* v. *Burman*, 61 Mo. 76; 16 Cyc. 918)."

The Missouri court has recently ruled in *Knorp* v. *Thompson*, 352 Mo. 44, l. c. 52:

> "It is not just that a court should, in deciding the issues of a case, consider evidence introduced in another and different case, and thus decide a case upon the evidence which a party had been afforded no opportunity to refute."

On this appeal this Court will review all federal questions decided by the state court, or which it was its duty to decide, and exclude from consideration all questions not raised by the appellants' petition and appellees' demurrers—excepting, of course, such federal questions as those referred to in assignments or points 2 and 37, which questions were brought into the record by the state court's unanticipated denials of the equal protection clause of the XIVth Amendment at a time when the record could not be added to, under the principle stated in *Shaw* v. *Saunders*, 244 U. S. 317, l. c. 320; *Brinkerhoff-Faris Trust & Sav. Co.* v. *Hill*, 281 U. S. 673; *Missouri Ins. Co.* v. *Gehner*, 281 U. S. 313.

Of course, under the Vth Amendment this Court, when a litigant demands a hearing to which he has a constitutional right, cannot render a valid judgment or decision without a hearing on the merits in any case wherein it has jurisdiction, in accordance with the principles stated in *Ex parte Nelson*, 251 Mo. 63, l. c. 103:

> "'He that answereth a matter before he heareth it, it is folly and shame unto him. (Proverbs, 18:13.)'"

Windsor v. *McVeigh*, 93 U. S. 274.

Hovey v. *Elliott*, 167 U. S. 409.
Protector and the Town of Colchester, Style 447 (1655); 82 English Repr. 850.

White, The Law in the Scriptures, Section 346, says:

> "• • • any system of law that would sentence an accused, without a hearing, would deny to him 'due process of law,' as guaranteed under the Constitution of the United States (Fifth Amendment, construed in *Mitchell* v. *Clark*, 110 U. S. 633), and also by the law of Moses. (Num. 35:30.)"

Accused, as appellees are, and guilty as they admit they are, we believe that they are right in their contention that this Court, under its own decisions and the Vth Amendment, will accord them an oral hearing and permit them to file briefs on the merits. Otherwise, its judgment would be without due process of law.

Rule 28 recognizes that they are entitled to an oral hearing, and we agree with them on that one point only. Appellants ask only the same right or privilege to a hearing on the merits, as guaranteed by the Fifth Amendment, the law and the rules of this Court. Said rules are the law of the court (*Rio Grande Irrigation & C. Co.* v. *Gildersleeve*, 174 U. S. 603, l. c. 608-609).

Appellants respectfully submit that by reason of the foregoing, all of appellees' motions should be overruled.

And since this Court unquestionably has jurisdiction, appellants now here invoke the protection of the Vth Amendment to the Constitution of the United States guaranteeing due process of law, and ask that they be permitted to present said cause on its full merits to the Court by means of briefs and oral arguments, as provided under the rules of this Court.

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RESPONSE TO APPELLEES' SUGGESTIONS.

Appellees' last suggestions reintroduce "Appellees' Suggestions Opposing Jurisdiction," on page 6 thereof. Appellees claim that the motion to strike and the suggestions in support thereof, in connection with appellees' suggestions opposing jurisdiction, justify their latest suggestions—not merely in support of the motion to strike, but also in support of the motion praying "the dismissal of the appeal" (page 7).

Appellees' discussion of appellants' very first assignment of error in their said suggestions opposing jurisdiction (934) is an illustration of the lack of merit of their complaint as to appellants' assignment of errors and statement of points. Their Point IX (1020) begins:

> "In Appellants' First Assignment of Error (see also page 5, Appellants' Jurisdictional Statement) it is claimed that the Supreme Court of Missouri, 193 S. W. (2d) 588, denied appellants their constitutional rights by holding that 'the petition did not state a cause of action.'
>
> The opinion itself shows the contrary."

Said assignment of error 1 seems to be sufficiently definite in stating that the trial court erred in deciding that appellants' pleading "did not state a cause of action."

We direct this Court's attention to the following from the opinion itself, which establishes that the opinion is not contrary to said "First Assignment of Error."

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The opinion says (827):

"Appellants have not been denied due process,"

notwithstanding appellees admit the allegations of the petition specifically disclosing that Mrs. Moffett was not accorded due process in the Kansas litigation by the Kansas district judge, nor by the Missouri courts under color of state laws, in denying Mrs. Moffett's attempt to be relieved from the pendency of the fictitious suits for $2,539,366.80 (268) for sixteen years.

The opinion continues (827):

"They have not only had their day in court, but their months and years,"

thus and thereby deciding that the only question in the case which constitutes the federal basis of the cause of action does not exist and hence that the pleading does not state a cause of action. This operates to make appellees' contention that the Supreme Court of Missouri did not decide that the petition did not state a cause of action, and did not decide any federal questions except one, a wholly baseless contention.

Does not said sardonic language in the opinion of itself decide that appellants' petition (154-323) does not state a cause of action?

Said decision, that appellant was not denied her federal rights under the due process and equal protection clauses of the XIVth Amendment, is supplemented by the following categorical statements in the opinion, disclosing that the opinion contradicts appellees' contention and specifically decides that appellants' pleading does not state a cause of action.

1. The opinion points out (824) that the amendment " * * * in no way affected the point made in the

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demurrers as to misjoinder of parties plaintiff or failure to state a cause of action."

2. In discussing the pleadings the opinion says (825):

> "The pleadings ruled upon by Judge Ridge were demurrers, nothing more. They may have contained repetition and surplusage, but the complaint as to defect of parties and failure to state a cause of action were clearly stated. Such could be determined from the face of the petition."

3. The opinion points out (821) that in a former case the court ruled:

> "* * * that 'misjoinder of parties,' although not listed in the statute, is a ground of demurrer because in that situation the petition does not state a cause of action,"

and then applied said alleged rule.

4. The opinion (827) calls attention to the assignments of error raising federal questions and says:

> "None of these assignments is germane to the question of whether the fifth amended petition contains a misjoinder of parties plaintiff or fails to state a joint cause of action."

Appellees admit that no case justifies their motion. They, however, cite one case (291 U. S. 293) wherein this Court found that the errors could have been stated in five points, whereas there were 250 assignments of error. Another case (238 U. S. 507) contained eighteen pages of assignments of error which dealt with one single transaction.

In contrast, this case involves many overt acts by ap-

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pellees and other conspirators in three states, between the year 1921 and this date.

And, in addition, there are federal questions in greater number raised in this case than in any case cited by appellees.

Appellants will brief all the questions raised in their statement of points.

Appellees also cite a court of appeals case (142 Fed. (2d) 141) which refers to failure to include numbered specifications of error in the appellants' brief.

The fact that appellees refer to such authorities of itself discloses that no authority sustains their contention and that the authorities as a whole destroy their contentions.

The Civil Rights Statutes (R. S. U. S., 1979, 1980 and 1981), supplementing the Constitution, authorized Mrs. Moffett to bring the action in the state court in every capacity in which she had sustained injury. In disobeying the rules of construction made obligatory upon the state court by R. S. U. S. 1 (Section 1, Title 1, U. S. C.) and by Section 652, R. S. Mo. 1939, the state court erred in failing to construe said Civil Rights Statutes as required by said construction statutes and erred in dismissing Mrs. Moffett's action on the ground of misjoinder of parties plaintiff, and thus and thereby denied appellants the rights, privileges and immunities secured by the provisions of the Constitution, laws and treaty referred to in the record herein.

Picking et al. v. *Pennsylvania R. Co. et al.*, 151 Fed. (2d) 240.
Bell et al. v. *Hood et al.*, 90 Law Ed. 758.
Georgia v. *Pennsylvania R. Co.*, 324 U. S. 439.

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The opinion of the Supreme Court of Missouri, by its statement that (820):

> "Appellants claim error under twenty-two numbered assignments, some being merely a repetition of others. We have considered all of these assignments, but see no useful purpose in discussing each one separately."

And by the further statement (829):

> "None of these assignments is germane to the question of whether the fifth amended petition contains a misjoinder of parties plaintiff or fails to state a joint cause of action,"

establishes the fact that the State Supreme Court considered all the federal questions and, in stating that they were not "germane" to the question of misjoinder of parties plaintiff or failure to state a joint cause of action, considered and decided each and all of the federal questions in the case against appellants. The question as to whether or not they were "germane" to the question which the state court decided is, of itself, a federal question to be decided by this Court. *Lovell* v. *Griffin*, 303 U. S., l. c. 450. The Supreme Court of Missouri was powerless, by said statement, to deprive this Court of jurisdiction to decide the federal questions raised in the case.

The Supreme Court of Missouri could not properly decide whether some assignments were "germane" to other assignments without considering both and rendering a decision based on both. And that court long ago applied the applicable principle to a similar question, to-wit: whether evidence was sufficient or insufficient to justify a judgment. In *State* v. *Cushenberry*, 157 Mo. 168, Judge Sher-

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wood italicized his own language with reference to such question as follows, l. c. 182:

> *"Whenever the sufficiency of the evidence is considered, necessarily you must consider its insufficiency; the two are inseparable in thought."*

Appellees' motion to strike is not really directed to appellants' "statement" of points. It is directed to an imaginary "designation" of points. And so the motion to strike is without any subject matter upon which to operate.

Applying the technical principles by which appellees regulate their conduct in every court, then for said reason, as well as for all the others, the motion to strike should be denied.

Barr v. *United States*, 324 U. S. 83, discusses the question whether dual or multiple exchange "rates" were in contemplation when an act of Congress was passed and held, l. c. 90, that though the statute was in the singular, yet

> "But if Congress has made a choice of language which fairly brings a given situation within a statute, it is unimportant that the particular application may not have been contemplated by the legislatures."

And so, in the Civil Rights Acts, the Congress has made choice of language which fairly brings the situation now before the Court within Section 43 and the other sections of Title 8, U. S. C. A. And this for the reason that Mrs. Moffett, on the record before this Court, is a single entity or person who has sustained loss in two capacities and the same facts and law constitute the basis of her rights in both.

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But this Court goes farther in the Barr case and also applies Section 1, U. S. C. A., to the construction of the statute, using the following language, l. c. 91:

> "It is true that Section 522 (c) speaks only of the 'buying rate.' And that use of the singular rather than the plural is stressed by respondent. We may note, however, in passing that Section 1 of the Revised Statutes, 1 U. S. C. A., Sec. 1, 2 F. C. A., Title 1, Sec. 1, provides that 'words importing the singular number may extend and be applied to several persons or things.'"

Appellants' statement of points includes the point that the state court, in applying the nonexisting state rule of practice as to misjoinder of parties plaintiff, altered Mrs. Moffett's rights as those rights were established in the federal law on which Mrs. Moffett based her action and whether the state court declined to enforce the remedy given to Mrs. Moffett by the federal law. Hence, said statement of points is sufficient because it enables this Court to consider and decide the question as to whether the state court's application of the alleged state rule of practice denied Mrs. Moffett the rights which the federal law protects.

In *Garrett* v. *Moore-McCormack Co.*, 317 U. S. 239, it is said, l. c. 245-246:

> "If by its practice the state court were permitted substantially to alter the rights of either litigant, as those rights were established in federal law, the remedy afforded by the state would not enforce, but would actually deny, federal rights which Congress, by providing alternative remedies, intended to make not less but more secure. The constant objective of legislation and jurisprudence is to assure litigants

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> full protection for all substantive rights intended to be afforded them by the jurisdiction in which the right itself originates. * * * So here, in trying this case, the state court was bound to proceed in such manner that all the substantial rights of the parties under controlling federal law would be protected. Whether it did so raises a federal question reviewable here under Section 237 (b) of the Judicial Code, 28 U. S. C. A., Section 344 (b)."

See, also, *Standard Oil Company* v. *Johnson*, 316 U. S. 481, which says, l. c. 482-483:

> "Since validity of the state statute as construed was drawn in question on the ground of its being repugnant to the Constitution, we think the case is properly here on appeal under Section 237 (a) of the Judicial Code, 28 U. S. C. A., Sec. 344 (a)."

Therefore, appellees' motions should be denied.

Respectfully submitted,

A. E. WATSON,
MARTIN J. O'DONNELL,
Attorneys for Appellants.

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Appellees do not discuss THIS COURT'S OPINION construing the Missouri demurrer statute in

MAGWIRE v. TYLER,
17 WALL. 253,286.

Perhaps it is because the Suggestions in support of the Motion sought to be stricken call attention thereto that Appellees are so anxious to have same stricken.

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In the Supreme Court of the United States

October Term, 1946.

LOUISE MCGREW MOFFETT AND LOUISE MCGREW MOFFETT as Executrix of the Estate of Thomas S. Moffett, Deceased. *Appellants,*

VS.

COMMERCE TRUST COMPANY, a Corporation, HELEN WEEDE, B. C. HOWARD AND WILLIAM H. KOPP, *Appellees.*

No. 318.

APPELLANTS' REPLY TO APPELLEES' TYPEWRITTEN MOTION TO STRIKE, SERVED ON APPELLANTS ON OCTOBER 9, 1946.

Appellees have accused appellants of prematurely filing the motion to prevent the printing of unnecessary and immaterial matter included in the transcript forwarded to this Court, which appellees have designated as necessary to be printed.

Counsel for appellants knew what the rules of this Court were when said motion was filed, but thought it a provident thing to do to attempt to prevent the printing

of said matter, regardless of who might be called upo
in the final analysis to pay the expense.

We note what appellees say on page 6 of their sai
typewritten motion, casting aspersions upon appellants
counsel, and will content ourselves by calling attention t
what is said on that subject in the case of *Royal Arcanu*
v. *Green*, 237 U. S. 531, at l. c. 546-547.

This Court, in *Magwire* v. *Tyler*, 17 Wall. 253, at l.
286, construed Section 922, R. S. Mo. 1939, in the yea
1873, at which time it was in the identical form in whic
it was on December 30, 1944. This Court there said:

> "By the same statute it is enacted that the defend
> ant may demur to the petition when it shall appea
> upon the face thereof, either—(1) That the cour
> has no jurisdiction of the person of the defendant o
> the subject-matter of the action. (2) That the plain
> tiff has not legal capacity to sue. (3) That there i
> another action pending between the same parties fo
> the same cause of action in the state. (4) That ther
> is a defect of parties plaintiff or defendant. (5) Tha
> several causes of action have been improperly united
> (6) That the petition does not state facts sufficien
> to constitute a cause of action. (7) That a party
> plaintiff or defendant, is not a necessary party to
> complete determination of the action. 2 Rev. Stat
> 1231."
>
> *"No other grounds of demurrer are allowed by the statutory rules of pleading."* (Italics ours.)

Appellants, in their point V on pages 12-14 of thei
suggestions in support of the motion sought to be stricken
call attention to the fact that the Missouri Supreme Cour
twice, and the Missouri Court of Appeals once, construed
said Section 922, R. S. Mo. 1939, as this Court construed
it. They call attention to the decision of the Supreme

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Court of Missouri *en banc* wherein it held that by re-adopting a construed statute without change, the construction became a part of the statute itself, which the court was powerless to change, and which could be changed only by the legislature. (*Ex parte Carey*, 306 Mo. 287, l. c. 294.)

Said decision *en banc* was binding on Division 1 of the Supreme Court of Missouri, not only in this case, but in the cases of *Nieuhaus* v. *Jos. Greenspon's Son Pipe Corp.*, 237 Mo. App. 112, and *Rockwood* v. *Crown Laundry Co.*, 352 Mo. 561.

The Missouri court *en banc*, in *State ex rel. Hopkins* v. *Daues*, 319 Mo. at l. c. 740, ruled:

> "There can be no question about the correctness of relator's contention that a decision of the court *en banc* is controlling, not only upon the appellate and all inferior courts, but upon the divisions of the Supreme Court as well. All inferior courts are bound to follow the latest controlling decision of this court. Although the decision of a division of the court upon a given question is later in point of time than a decision of the court *en banc* upon the same question, the decision of the court *en banc* is nevertheless the controlling decision. If there is conflict between the later divisional opinion and the earlier decision of the court *en banc*, it is the duty of all inferior courts, including the divisions of the Supreme Court itself, to follow the decision of the Supreme Court *en banc*."

The decision of this Court in *Magwire* v. *Tyler, supra*, was binding on the Supreme Court of Missouri in every case in which a Federal question was involved, when it held that no ground not specified in the statute could constitute a ground of demurrer so as to defeat a Federal right.

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The decisions of the courts of Missouri in *Nieuhaus* v. *Jos. Greenspon's Son Pipe Corp.*, 237 Mo. App. 112, and *Rockwood* v. *Crown Laundry Co.*, 352 Mo. 561, are in direct conflict with the case of *Magwire* v. *Tyler*, 17 Wall. 253, l. c. 286, in that expressions are used in the opinions to the effect that a Federal right can be lawfully denied on the ground of misjoinder of parties plaintiff in a case where a Federal right is involved in a Missouri court by alleging a ground of demurrer excluded from the statute.

Said decisions are also in conflict with the following decisions by the Supreme Court of Tennessee on the same identical question construing the same identical Federal law: *Hunt* v. *National Linen Service Corp.*, 157 S. W. (2d) 608, and *Burns* v. *Gilpin*, 188 S. W. (2d) 338.

Conclusion.

Burt v. *City of New York*, 156 Fed. (2d) 791 (C. C. A. 2), agrees with the decision in *Picking et al.* v. *Pennsylvania R. Co. et al.*, 151 Fed. (2d) 240 (C. C. A. 3).

Those decisions are in conflict with the decision of the Supreme Court of Missouri in this case, in holding that Mrs. Moffett has no right to recover under the Civil Rights Acts, and establish that if the conflict is to be settled by this Court, the record must be printed, and appellees' motion to strike be denied.

Respectfully submitted,

A. E. Watson,
Martin J. O'Donnell,
Attorneys for Appellants.

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JUL 19 1946
CHARLES ELMORE CROPLEY
CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1946

No. 318

LOUISE McGREW MOFFETT AND LOUISE McGREW MOFFETT AS EXECUTRIX OF THE ESTATE OF THOMAS S. MOFFETT, DECEASED,

Appellants,

vs.

COMMERCE TRUST COMPANY, A CORPORATION, HELEN WEEDE, B. C. HOWARD, AND WILLIAM H. KOPP

APPEAL FROM THE SUPREME COURT OF THE STATE OF MISSOURI

STATEMENT OPPOSING JURISDICTION AND MOTION TO DISMISS OR AFFIRM

JOHN T. HARDING,
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II. There is no provision of the Constitution or Statutes of the United States which gives the Appellants the right to maintain *jointly* in the courts of Missouri, the instant suit for their alleged cause or causes of action and no rights under the Constitution or laws of the United States were denied to Appellants by the holding of the court that there was a misjoinder of parties plaintiff 22

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cial notice of its own records in former cases closely interwoven with, companion to and interdependent with the instant case and to take judicial notice of the public statutes and judicial decisions of the State of Kansas pleaded in the instant action. (c) The Circuit Court of Jackson County, Missouri, in the instant case was entitled to take judicial notice of all prior proceedings of said Circuit Court and of any divisoin thereof in the instant case, all of the divisions thereof constituting but a single court 71

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1946

No. 318

LOUISE McGREW MOFFETT AND LOUISE McGREW MOFFETT AS EXECUTRIX OF THE ESTATE OF THOMAS S. MOFFETT, DECEASED,

Appellants,

vs.

COMMERCE TRUST COMPANY, A CORPORATION, HELEN WEEDE, B. C. HOWARD, AND WILLIAM H. KOPP,

Appellees

APPELLEES' SUGGESTIONS OPPOSING JURISDICTION, AND MOTION TO DISMISS APPEAL OR AFFIRM JUDGMENT

Statement

The Appellees, believing that the matters set forth below will demonstrate the lack of substance in the questions raised by this appeal, file this, their statement in opposition to Appellants' statement as to jurisdiction. Appellees include herein and at the end hereof their motion to dismiss the appeal, or, in the alternative, to affirm the judgment

of the Supreme Court of Missouri, on the ground that the questions raised on behalf of Appellants are so unsubstantial as not to sustain the jurisdiction of this Court and not to require further argument. Appellees assert that the unsubstantial character of the grounds stated by Appellants is so apparent on the face of the record as to defeat the jurisdiction of this Court and to warrant summary disposal of the appeal by the Court at this stage of the proceeding. The matters here relied upon by the Appellees are more particularly stated in the following parts of this statement.

Foreword to Discussion

The Appellees have heretofore been and now are separately represented by their respective counsel. However, to avoid unnecessary repetition and conserve the time and labor of this Court, Appellees have joined in the suggestions and motion hereinafter set out. We regret the length of these suggestions but feel compelled to discuss the question involved at some length because of the long, involved and confusing Assignments of Error and Jurisdictional Statement filed by Appellants. Appellants' Assignments of Error cover some six and one-half crowded pages of typewriting. Their Jurisdictional Statement covers more than thirty-three crowded typewritten pages, exclusive of exhibits.

On Page 46 of the Jurisdictional Statement, there appears the following:

> "Appellants adopt and make Motion for rehearing and to Transfer to the Court en banc in the state supreme court, and Assignments of Error herein filed, a part hereof, as fully as if set forth as a part of this jurisdictional statement."

Examination of this motion discloses that it consists of twenty-four pages, and, further, that most of the contentions

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therein were relative to non-Federal questions. We respectfully submit in passing that it is violative of at least the spirit of the Rules of this Court in proceedings of this character for the Appellants to incorporate in a jurisdictional statement by reference a lengthy document of this character. We feel that the jurisdictional statement should not go beyond the confines of the Assignments of Error, which are a part of the appeal papers to this Court. We believe Appellants' Assignments and Jurisdictional Statement merit the condemnation given plaintiff in error's assignments in the case of *Central Vermont Railway Co.* v. *White, Administratrix,* 238 U. S. 507, where the Court said:

> "• • • The case was brought here on a record containing so many assignments, covering 18 printed pages, as to make it proper to repeat the ruling in Phillips *v.* Seymour, 91 U. S. 648, that the 'practice of filing a large number of assignments cannot be approved. It perverts the purpose sought to be subserved by the rule requiring any assignments.' 'It points to nothing and thwarts the purpose of the rule' (Chicago, Great Western Ry. Co. *v.* McDonough, 161 Fed. Rep. 659) which was intended to present to the court a clear and concise statement of material points on which the plaintiff in error intends to rely."

Appellants here might just as well point to the sky as to their assignments of error and jurisdictional statement. The one would be about as indefinite as the other.

This Court in the *Central Vermont Railway* case, *supra,* said further (238 U. S. l. c. 509):

> "Some of the assignments in the present case relate to matters of pleading; others to the admissibility of evidence, to the sufficiency of exceptions, and to various rulings of the trial court which involved no construction of the Employers Liability Act and which, therefore, cannot be considered on writ of error from a state court. Seaboard Air Line *v.* Duvall, 225 U. S. 477, 487."

That case was an appeal from a Vermont judgment. What is there said is applicable to most of the matters complained of here, to-wit: they are matters of State practice, involve no Federal question, and a State court judgment thereon is final and conclusive.

Preliminary to our discussion of the jurisdiction questions involved, we desire to call attention to a few fundamental rules. Appellants are here invoking the appellate jurisdiction of this Court to review the judgment of the Missouri Supreme Court. The burden is therefore upon appellants to demonstrate this Court has jurisdiction. In the case of *Gorman* v. *Washington University*, 316 U. S. 98, 62 S. Ct. Rep. 962, this Court said: (l. c. 964)

> "Upon application to this Court for review of the judgment of a state court it is the petitioner's burden to show affirmatively that we have jurisdiction. Memphis Natural Gas Co. *v.* Beeler, 315 U. S. 649, 62 S. Ct. 857, 86 L. Ed. —."

The opinion in the case cited in the quotation above, *Memphis Natural Gas Company* v. *Beeler*, 315 U. S. 649, 62 S. Ct. 57, states: (l. c. 859)

> "The case comes here by appeal from a judgment of the Supreme Court of Tennessee, which sustained the tax and reversed a decree of the Tennessee chancery court enjoining its collection. * * * The Judicial Code was intended to restrict our obligatory appellate jurisdiction to a narrow class of cases, and to foreclose an appeal as of right whenever the prescribed conditions have not been rigorously fulfilled."

To discharge the burden upon them and demonstrate this Court has jurisdiction herein, Appellants must prove that there was a substantial Federal question involved upon which the State Court decision necessarily rests. The requirements in this connection are well stated by this Court

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in the case of *Southwestern Bell Telephone Company* v. *State of Oklahoma*, 303 U. S. 206, 58 S. Ct. Rep. 528, as follows: (l. c. 530)

> "We have repeatedly held that it is essential to the jurisdiction of this Court in reviewing a decision of a court of a State that it must appear affirmatively from the record, not only that a federal question was presented for decision to the highest court of the State having jurisdiction, but that its decision of the federal question was necessary to the determination of the cause; that the federal question was actually decided or that the judgment as rendered could not have been given without deciding it. DeSaussure *v.* Gaillard, 127 U. S. 216, 234, 8 S. Ct. 1053, 32 L. Ed. 125; Johnson *v.* Risk, 137 U. S. 300, 306, 307, 11 S. Ct. 111, 34 L. Ed. 683; Wood Moving & Reaping Machine Co. *v.* Skinner, 139 U. S. 293, 295, 297, 11 S. Ct. 528, 35 L. Ed. 193; Whitney *v.* California, 274 U. S. 357, 360, 361, 47 S. Ct. 641, 642, 643, 71 L. Ed. 1095; Lynch *v.* New York, 293, U. S. 52, 54, 55 S. Ct. 16, 17, 79 L. Ed. 191."

In the case of *Radio Station WOW* v. *Johnson*, 326 U. S. 120, 65 S. Ct. Rep. 1475, this Court stated the rule as follows: (l. c. 1480)

> "Here the Nebraska Supreme Court held that the federal question had dropped out as a matter of pleading and also denied its merits. This brings the situation clearly within the settled rule whereby this Court will not review a State court decision resting on an adequate and independent non-federal ground even though the State court may have also summoned to its support an erroneous view of federal law. 'Where the judgment of the state court rests on two grounds, one involving a federal question and the other not • • • and the ground independent of a federal question is sufficient in itself to sustain it, this Court will not take jurisdiction.' Lynch *v.* New York, 293 U. S. 52, 54, 55, 55 S. Ct. 16, 17, 79 L. Ed. 191."

We are confident Appellants have failed to meet the above tests and discharge their burden to prove jurisdiction in this Court by reason of a substantial Federal question actually passed upon and necessary to the decision of the State court. We shall now attempt to demonstrate that Appellants have failed to discharge this burden and because thereof, this appeal should be dismissed.

I

The contention that this Court acquired jurisdiction by reason of the alleged point that Section 948 R. S. Missouri, 1939, is violative of Section 10, Article I of the Constitution of the United States is so clearly without foundation as to present no substantial or colorable Federal question. The judgment rendered herein in conformity to said section was not upon the merits and is no bar to the commencement of another action. (Appellants assignment of errors numbers 14, 15 and 18)

By reference to the opinion of the Supreme Court of Missouri in the instant case, 193 S. W. 2 588, it is readily apparent that the only Federal question which the Supreme Court of Missouri had occasion to pass upon, and did pass upon, in arriving at its decision that the judgment of the court below was right in sustaining the demurrers and dismissing the petitions for misjoinder of parties plaintiff (a procedural question) was the contention that Section 948 R. S. Mo. 1939 was in effect a bill of pains and penalties and a violation of the provisions of Article I, Section 10, of the Federal Constitution which prohibits a State from passing a bill of attainder.

Section 948 R. S. Mo. 1939 is as follows:

"Sec. 948. Proceedings if third pleading is insufficient.

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"If a third petition, answer or reply be filed and adjudged insufficient as above, or the whole or some part thereof be stricken out, the party filing such pleading shall pay treble costs; and no further petition, answer or reply shall be filed, but judgment shall be rendered. R. S. 1929, #796."

It is the third of a series of correlated sections which were first enacted by the State of Missouri in 1825, the first of which, section 946 id., provides that when a petition, answer or reply shall be adjudged insufficient in whole or in part upon demurrer or the whole or some part thereof stricken out on motion, the party may file a further like pleading within such time as the court shall direct; and in default thereof, the court shall proceed with the cause as if no such original pleading had been filed.

The second section, 947 id., provides that if such a second pleading be filed and adjudged insufficient or stricken in whole or in part, the party filing the same shall pay double costs, and file a like pleading instanter; or in default thereof, the court shall proceed as if no second pleading had been filed. It will be noted that Section 948 id., simply provides for treble costs, forbids the filing of any further like pleading and commands that judgment shall be rendered.

Section 948 id., thus attacked not only has been upon the statute books of the State of Missouri for one hundred twenty years, but intensive research has failed to disclose any previous attack upon its validity under either the Federal or State constitutions. On the contrary, it has been construed, applied and enforced universally by the trial courts of Missouri, with the approval of the Supreme Court and other appellate courts of that State when exercised in accordance with their interpretation of its meaning and effect.

The provisions of Section 948 id., are wise, salutary and remedial. The reasons which in the opinion of the appellate

courts of Missouri, influenced the Legislature to enact that section have been cogently set forth in the decisions cited below, among others.

In *Beardslee* v. *Morgner*, 73 Mo. 22, the Supreme Court of Missouri, in a decision rendered in the year 1880, said with reference to the section in question:

> "The legislature, no doubt, thought a pleader who could not draw a good petition in three trials ought to go out of court, and not detain his adversary any longer by his blundering dilatoriness. Whatever they may have thought, this is what they commanded, and that command we are not at liberty to ignore."

In *Sidway* v. *Land & Live Stock Co.*, 197 Mo. 359, l. c. 371-373, 94 S. W. 855, a decision rendered in the year 1906, the court elaborately construes and applies the meaning and intent of this section thus:

> "The lawmakers doubtless thought that some time should be fixed in which efforts to litigate should cease, and they therefore provided that, when a third petition was filed and adjudged insufficient, it was the duty of the court to end such efforts at litigation, and render judgment providing that the party filing such petition should pay treble costs, and prohibiting the filing of any further petitions." (But such judgment does not bar another action. This is briefed *infra*.)

Bennett v. *Southern Bank of Mexico*, 61 Mo. App. 297 was decided by the Kansas City Court of Appeals, in an able opinion which has been cited with approval by the Supreme Court of Missouri. The Court of Appeals in its opinion on rehearing, said of the section in question:

> "The offending party is punished for the negligent or unskillful manner of drafting his pleading."

The foregoing, together with other similar opinions of the Missouri appellate courts are well summarized in the

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opinion in the instant case (193 S. W. 2d 588, l. c. 592) wherein the court says of Section 948 id.:

> "This statute, until the effective date of our new Code, was in force for one hundred twenty years. It has frequently been construed by this and other courts and, so far as we know, its constitutionality has never been assailed before. • • • It applies only to civil procedure, inflicts no penalty without a hearing, authorizes neither fine nor imprisonment, but only a money judgment for unreasonably consuming the time of courts and litigants and causing needless expense by filing defective petitions. Its constitutionality is presumed and appellants have offered nothing to rebut the presumption."

The presumption of constitutionality which attaches to every State statute unquestionably attaches in this case. *Alaska Packers Association* v. *Industrial Acci. Com.*, 294 U. S. 532 l. c. 543; 79 L. Ed. 1044, l. c. 1049. And the burden rests upon the appellants to overcome that presumption and to demonstrate plainly any asserted invalidity. *Missouri Pac. Railroad Co.* v. *Norwood*, 283 U. S. 249, l. c. 254, 255, 75 L. Ed. 1016, wherein this Court said:

> "The state laws are presumed valid. • • • The burden is on the plaintiff by candid and direct allegations to set forth in its complaint facts sufficient plainly to show the asserted invalidity. Aetna Ins. Co. *v.* Hyde, 275 U. S. 440, 447, 72 L. Ed. 357, 364, 48 S. Ct. 174, and cases there cited. New Orleans Pub. Service *v.* New Orleans, 281 U. S. 682, 686, 74 L. Ed. 1115, 1118, 50 S. Ct. 449; Beaumont, S. L. & W. R. Co. *v.* United States, 282 U. S. 74, 88, ante, 221, 51 S. Ct. 1."

Appellants have the burden of overcoming the presumption of facts supporting constitutionality, which attaches to all State legislative acts. *Lawrence* v. *State Tax Commission*, 286 U. S. 276, 76 L. Ed. 1102, 52 S. Ct. 556, 87 A. L. R. 374.

Section 948 R. S. Mo. 1939 has stood unchallenged as to constitutionality upon the statute books of the State of Missouri for one hundred twenty years. The presumption of validity which applies to legislation generally is fortified by acquiescence through a number of years. 11 Amer. Jur. Prud. "Constitutional Law", Sec. 83, page 705.

With respect to the constitutionality of giving of notice of proceedings affecting property within the county by posting on the Court House door which had been authorized by statutes of the State of Kentucky, as to various subjects and at various times since 1796, the late Chief Justice Stone, speaking for this Court, said in *Anderson National Bank* v. *Luckett*, 321 U. S. 233, 88 L. Ed. 692, 151 A. L. R. 824, that:

> "The fact that a procedure is so old as to have become customary and well known in the community is of great weight in determining whether it conforms to due process, for 'Not lightly vacated is the verdict of quiescent years.' (citing cases)"

In *Life & Casualty Ins. Co.* v. *McCray*, 291 U. S. 566, 78 L. Ed. 987, there was a challenge to the constitutionality of a statute of the State of Arkansas by which an insurance company failing to pay a loss within the time specified in the policy, after demand made therefor, was made liable to the policy holder in addition to the amount of the loss, for twelve (12) per cent damages thereon and reasonable attorneys fee. This Court, speaking through Mr. Justice Cardozo, refers to the act in question as a sample of a type of statutes adopted in other States, referring particularly to the similar Texas Statutes first enacted in 1879 and upheld by this Court. The opinion then proceeds:

> "During the half century and more in which the act has been in force, no one, it seems, has protested to any court that the percentage is immoderate. The same statute came before us again in Iowa L. Ins. Co. v.

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Lewis, supra, (187 U. S. 355, 47 L. ed. 213, 23 S. Ct. 126). We renewed our approval, and said of our earlier opinion (Fidelity Mut. Life Asso. *v.* Mettler): 'We are • • • entirely satisfied with the case and its reasoning.' p. 355. Cf. Farmers' & M. Ins. Co. *v.* Dobney, supra (189 U. S. 305, 47 L. ed. 826, 23 S. Ct. 565). The presumption of validity which applies to legislation generally is fortified by acquiescence continued through the years. Corn Exch. Bank *v.* Coler, 280 U. S. 218, 74 L. ed. 378, 50 S. Ct. 94; Ownbey *v.* Morgan, 256 U. S. 94, 65 L. Ed. 837, 41 S. Ct. 433, 17 A. L. R. 873."

The presumption of the constitutionality of Section 948 R. S. Mo. 1939 is fortified by the acquiescence of the bench, the bar and the public in its validity throughout one hundred twenty years. That presumption becomes a certainty when we test the challenged sections by the classic definition of a bill of pains and penalties, as formulated by this Court in *Cummings* v. *Missouri*, 4 Wall. 277, l. c. 323, 18 L. Ed. 356 l. c. 363, wherein it is held:

> "A bill of attainder is a legislative act, which inflicts punishment without a judicial trial.
>
> "If the punishment be less than death, the act is termed a bill of pains and penalties. Within the meaning of the Constitution, bills of attainder include bills of pains and penalties. In these cases the legislative body, in addition to its legitimate functions, exercise the powers and office of judge; it assumes, in the language of the textbooks, judicial magistracy; it pronounces upon the guilt of the party, without any of the forms or safeguards of trial; it determines the sufficiency of the proofs produced, whether conformable to the rules of evidence or otherwise; and it fixes the degree of punishment in accordance with its own notions of the enormity of the offense."

Section 948 id. does not authorize either fine or imprisonment, but only a civil penalty imposed not for the vindica-

tion of public authority but as a compensation to the injured party, and this only after the third pleading be "adjudged insufficient". The word "adjudged" means a *judicial* determination of fact and entry of *judgment*.

Department of Banking v. *Hedges*, 136 Nebr. 382, 286 N. W. 277. It means a judgment entered by a court of competent jurisdiction. *Webb* v. *Bidwell*, 15 Minn. 479, 484; *Dobbins* v. *Gas Co.*, 182 Cal. 616, 189 Pac. 1073, 1082; *Dean* v. *State*, 120 Fla. 60, 162 So. 155. As stated at the beginning of this point, sections 946, 947 and 948 R. S. Mo. 1939 dealing with the first, second and third pleadings in each instance provide that before the consequences specified in the particular section shall be adjudged, the pleading shall have been adjudged insufficient. Consequently, the command of Section 948 id., that no further pleading shall be filed but judgment shall be rendered, can only apply when each of the three pleadings in question shall have been already determined to be insufficient by the judgment of the court.

This Court has repeatedly recognized and applied the distinction between penalties which are imposed as a punishment for crime and those which are *per se* civil in nature, affording only a remuneration to a private party for injury sustained in course of litigation. In *Life & Cas. Ins. Co.* v. *McCray*, *supra*, with reference to recovery of percentage damages and attorneys fee, for delayed payment of insurance losses, Mr. Justice Cardozo said for this Court that:

> " 'Penalty' is a term of varying and uncertain meaning. There are penalties recoverable in vindication of the public justice of the state. There are other penalties designed as reparation to sufferers from wrongs. Huntington *v.* Attrill, 146 U. S. 657, 668, 36 L. Ed. 1123, 1127, 13 S. Ct. 224; Brady *v.* Daly, 175 U. S. 148, 154, 157, 44 L. ed. 109, 112, 113, 20 S. Ct. 62; St. Louis,

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I. M. & S. R. Co. *v.* Williams, 251 U. S. 63, 66, 64 L. ed. 138, 140, 40 S. Ct. 71; Loucks *v.* Standard Oil Co., 224 N. Y. 99, 103, 120 N. E. 198. • • • the penalty may be no more than the fair price of the adventure. St. Louis, I. M. & S. R. Co. *v.* Williams, supra, (251 U. S. 66, 64 L. ed. 140, 40 S. Ct. 71). In that event, the litigant must pay for his experience, like others who have tried and lost." (291 U. S. l. c. 574, 575, 78 L. ed. l. c. 992.)

In *Brady* v. *Daly*, 175 U. S. 148 l. c. 157, 44 L. Ed. 109, l. c. 113, this Court said in discussing the nature of an action at law to recover damages for infringement of copyright under U. S. R. N. Statutes Section 4966, that:

> "Although punishment, in a certain and very limited sense, may be the result of the statute before us so far as the wrongdoer is concerned, yet we think it clear such is not its chief purpose, which is the award of damages to the party who had sustained them, and the minimum amount appears to us to have been fixed because of the inherent difficulty of always proving by satisfactory evidence what the amount is which has been actually sustained."

And in *Huntington* v. *Attrill*, 146 U. S. 657, l. c. 667, 36 L. Ed. 1123, l. c. 1127, this Court held:

> "In the municipal law of England and America, the words 'penal' and 'penalty' have been used in various senses. Strictly and primarily, they denote punishment, whether corporal or pecuniary, imposed and enforced by the State, for a crime or offense against its laws. United States *v.* Reisinger, 128 U. S. 398, 402 (32: 480, 481); United States *v.* Chouteau, 102 U. S. 603, 611 (26: 246, 249). But they are also commonly used as including any extraordinary liability to which the law subjects a wrongdoer in favor of the person wronged, not limited to the damages suffered. • • •
>
> "Statutes giving a private action against the wrongdoer are sometimes spoken of as penal in their nature,

but in such cases it has been pointed out that neither the liability imposed nor the remedy given is strictly penal."

Appellants have presented nothing to sustain their contention that Section 948 id., is a bill of pains and penalties. In the opinion in the instant case the Supreme Court of Missouri said (193 S. W. 2 588 l. c. 592) of this section:

> "Its constitutionality is presumed and appellants have offered nothing to rebut the presumption".

In their jurisdictional statement to this Court, and particularly in "A. The Federal Questions Involved Herein are Substantial" thereof, they submit nothing to rebut the presumption of constitutionality of that section, or in support of their contention of unconstitutionality made under point 14 of their assignment of error.

With respect to the claimed aspect of Section 948 id., as an alleged bill of pains and penalties a noteworthy parallel is found in Section 1010 R. S. Title 28 U. S. C., Section 878, reading as follows:

> "878. Damages and costs on affirmance. Where, upon a writ of error, judgment is affirmed in the Supreme Court or a circuit court of appeals, the court shall adjudge to the respondents in error just damages for his delay, and single or double costs, at its discretion.

This section had its origin in the Judiciary Act of 1789. (Historical note to Sec. 878 Title 28 U. S. C. A.) This section gives authority to award damages for delay where in form, there is no judgment of affirmance but only an order for the dismissal of a writ of error to a State court (or an appeal therefrom, since enactment of 45 Stat. 54 Sec. 861-a U. S. C. substituting appeal for writ of error) because of the unsubstantial and frivolous character of the as-

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serted Federal writ. *Deming* v. *Carlisle Packing Co.*, 226 U. S. 102, 57 L. Ed. 140, 33 S. Ct. 80.

In *Roe* v. *Kansas ex rel. Smith*, 278 U. S. 191, l. c. 193, 73 L. Ed. 259, l. c. 261, with reference to the above quoted statute this Court held:

> "This writ of error to the supreme court of Kansas must be dismissed. The alleged grounds therefor are so lacking in substance that they may be properly designated as frivolous.
>
> • • • • • • •
>
> "In Slaker *v.* O'Connor (No. 61) (278 U. S. 188, ante, 258, 49 Sup. Ct. Rep. 158), we have referred to the statutes and rule which give us authority to impose penalties and costs where causes are brought here upon frivolous appeals or writs of error. The alleged ground for the present writ is without substance, and the circumstances justify the imposition of a penalty upon the party at fault.
>
> "The writ of error will be dismissed and a penalty of $200 payable to the defendants in error, together with all costs, will be taxed against the plaintiff in error,"

And it is worthy of note that in the last cited case this Court declined to hear counsel for the defendants in error, and the inference is that such action was by reason of the unsubstantial grounds asserted in support of the claimed Federal jurisdiction.

In *Wright* v. *Central National Bank*, 37 Fed. 2 234, certiorari denied 281 U. S. 755, 74 L. Ed. 1165, 50 S. Ct. 409, the defendants in an action at law had previously defended the action against them and appealed from the resulting judgment, which was affirmed. The reported case was an appeal from the judgment of the United States District Court dismissing an action in equity to enjoin enforcement

of the judgment previously recovered at law. The Circuit Court of Appeals, in dismissing the appeal, held:

> "The defendants in the law action had full opportunity to defend. They answered and did defend in that case and appealed from the judgment against them, which was affirmed. This appeal is wholly without merit, vexatious and frivolous. The penalty provided in sections 878 and 880 of title 28 U. S. Code (28 U. S. C. A. #879, 880) should be applied here. Slaker, Adm'r *v.* O'Connor, 278 U. S. 188, 49 S. Ct. 158, 73 L. Ed. 258; Roe *v.* Kansas ex rel Smith, Atty. Gen., 278 U. S. 191, 49 S. Ct. 160, 73 L. ed. 259."

It is not amiss here to remind the court that the appellants herein, after following the same course as did the appellants in *Wright* v. *Central National Bank, supra,* after this Court in *Moffett* v. *Robbins,* 298 U. S. 675, 80 L Ed. 1397, 56 S. Ct. 940, had denied certiorari to review the decision of the Circuit Court of Appeals in *Moffett* v. *Robbins,* 81 Fed. 2 431, proceeded to bring the present action for damages in the Circuit Court of Jackson County, Missouri. We believe that this litigation is practically unparalleled in the history of American jurisprudence. In addition to the fact that this Court denied certiorari to review the decision of the Circuit Court of Appeals against the appellants herein and therein on the suit to enjoin the judgments in the Kansas State Court, this Court previously had denied certiorari to review the decision of the Supreme Court of Kansas in *Moffett* v. *Moffett,* 131 Kan. 582, 292 Pac. 947, 77 A. L. R. 294, Certiorari denied 283 U. S. 827, 75 L. Ed. 1440, and this Court likewise had denied certiorari to review the decision of the Supreme Court of Kansas in *Clark* v. *Moffett,* 136 Kan. 711, 18 Pac. 2 555, certiorari denied 290 U. S. 642, 78 L. Ed. 558; leave to file petition for rehearing denied 290 U. S. 602, 78 L. Ed. 528.

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In *Bell* v. *Hood*, decided by this Court on April 1, 1946, 90 Fed. advance sheets 758, this Court speaking through Mr. Justice Black, said that:

> "• • • a suit may sometimes be dismissed for want of jurisdiction where the alleged claim under the Constitution or federal statute clearly appears to be immaterial and made solely for the purpose of obtaining jurisdiction or where such a claim is wholly insubstantial and frivolous."

We submit that the last quoted statement is entirely applicable to the contentions of appellants with respect to Section 948 id. Appellants in addition to their assignment of error number 14, in which they attack Section 948 id., as a bill of attainder, make two further assignments of error with respect to the same section of the statute as follows:

> "15. The court erred in denying appellants' rights under the XIVth Amendment by affirming the judgment dismissing the case and assessing the penalty provided by Section 948 on the alleged ground that three petitions had been held insufficient on demurrer.
>
> • • • • • • •
>
> "18. The court erred in denying appellants' rights under the XIVth Amendment by its judgment of dismissal and assessing a penalty against appellants."

These assignments are elaborated in their Jurisdictional Statement under "How Federal Questions Were Raised," by the allegations that "said action was dismissed by the court and appellants' right to recover or to institute any further action forfeited, and a statutory penalty in favor of appellees adjudged against appellants, • • •" and under "B," "The Missouri Partnership Administration Statute conflicts with the XIIITH XIVTH Amend-

ments and Treaty with France of April 30, 1803," wherein appellants say of Section 948 id., that:

> "*Said statute, as applied herein by the trial court,* was void because contrary to the law of the State and Nation, in that the trial court, without a hearing, and by denying appellants' request for a hearing (421) required by the rules (402-406), was binding on the court (Meierhoffer *v.* Hansell, 294 Mo. 195). *That judgment (424-425) forfeited appellant'- right to maintain the action or to institute another,* and, with its assessment of a penalty, made said statute a mere legislative decree and a true bill of pains and penalties." (Italics added for emphasis.)

They assert the dismissal affirmed on appeal in the instant case deprived appellants of the right to bring and maintain any action claiming damages for their alleged loss and thus was as much a bill of attainder as if a punishment had been directly imposed.

The challenged judgment, under the unvarying decisions of the Supreme Court of Missouri, has no greater effect than any other judgment on demurrer and is not a bar to the commencement or maintenance of another action. In *Gordon* v. *Burris,* 125 Mo. 39, 28 S. W. 191, the Supreme Court held, with respect to the instant contention that:

> "As the party in fault because of having filed *three* defective pleadings is required to pay treble costs, it is to be presumed that judgment is to be rendered for such costs. But there is no intimation in the section that a judgment is to be rendered on the *merits,* or that such judgment shall be a *bar* to any future proceedings involving the same facts."

In *Bennett* v. *Bank,* 61 Mo. App. 297, l. c. 301, the Kansas City Court of Appeals held as to the effect of Section 948 id., as a bar to further action, as follows:

> "It seems plain to my mind that a judgment entered on the third demurrer is of no greater force than if

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the plaintiff had, on the first or second adverse ruling, declined to amend, and judgment had been entered against him. A judgment in either case is a judgment on demurrer, and the one is as effective to shut off future litigation as the other."

Appellants under subdivision "D" of their Jurisdictional Statement asserting "There Was No Misjoinder of Causes of Action or of Parties Plaintiff" rely upon *Wilson Co.* v. *Inst. Co.*, 300 Mo. 1, 254 S. W. 266. In the course of the opinion therein, the Supreme Court of Missouri holds (300 Mo. 1, l. c. 36) with respect to Section 948 id., as a bar, as follows:

> "But it is equally as well settled that such final adjudication, in order to be a bar, must have been on the merits. In other words, a judgment on demurrer is not a bar to a subsequent suit between the same parties touching the same cause of action. (Wells *v.* Moore, 49 Mo. 229; Freeman on Judgments, (4 Ed.) sec. 260; Bennett *v.* Southern Bank, 61 Mo. App. 297.) The statute above referred to authorizes the court upon sustaining the third demurrer to do no more than enter the usual judgment on demurrer, give judgment for the penalty of treble costs and dismiss the petition, thus leaving the plaintiff free to institute a new suit if he chooses to do so. (Gordon *v.* Burris, 125 Mo. 39, 28 S. W. 191; Bennett *v.* Southern Bank, 61 Mo. App.)"

The foregoing authorities completely refute the contention by appellants that Section 948 id., imposed a penalty upon them or deprived them of any rights under Amendment XIV to the Constitution of the United States. Section 10 of Article I of the Constitution provides that

> "No State shall • • • pass any Bill of Attainder • • •."

Section 948 R. S. Mo. 1939 makes no provision that the party whose petition is dismissed thereunder shall be bar-

red from bringing another action as the Supreme Court of Missouri has repeatedly held in the above cited cases and others. The Supreme Court of Missouri in its opinion in the instant case (193 S. W. 2d 588) held that the judgment of the trial court was proper under Section 948 id., as thus theretofore interpreted by the Missouri Supreme Court.

Thus there is no point or substance to the appellants' assignments of error number 15 and number 18, since the challenged judgment did not deprive the appellants or either of them of any right which they may have to bring or maintain another action; and neither under said assignments nor under appellants' assignment of error number 14, is there any plain, substantial, non-frivolous assertion of any Federal right which could be defeated by the application of the local rule of practice prescribed by Section 948 id. The question of local practice is not interwoven with the decision of any question of national authority, because appellants, to sustain their contention that the instant judgment is not based on a non-Federal ground were compelled to assert the proposition that the challenged judgment was on the merits in the sense of being a bar to a further action, which contention the above cited Missouri authorities absolutely refute, and thus render inapplicable the authorities cited by appellants under "C" of their Jurisdictional Statement. In *Parker* v. *McLain*, 237 U. S. 469, 59 L. Ed. 1051, on a similar proposition, this court held the decision of the State Supreme Court controlling. It said:

> "Whether by consenting to the revivor, and thus recognizing the executrix as the real party in interest (see Gen. Stat. (Kan.) #6023), the defendant was estopped from subsequently challenging her capacity to maintain the action, was purely a question of local law or practice, and its decision by the supreme court of the state is controlling."

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In *Johnson* v. *Drew*, 171 U. S. 93, 43 L. Ed. 88, this court, through Mr. Justice Brewer held:

> "The ruling of the trial court in sustaining the demurrer to the first equitable plea and refusing leave to permit the second to be filed presents no question for the consideration of this court, for it was held by the supreme court of the state that under the plea of not guilty all the matters of defense set up in these equitable pleas could be offered in evidence and made available; and, in fact, the defendant on the trial did offer his testimony to establish them. So, the substantial rights of the defendant were not prejudiced, and the ruling involved merely a question of state practice."

The question being thus one of local practice the reason for the rule was forcefully stated by this court in *New Orleans Waterworks Co.* v. *Louisiana*, 185 U. S. 336, l. c. 353, 46 L. Ed. 936, l. c. 944, in these words:

> "If it were otherwise, then any alleged error in the decision by a state court, in applying state law to the case in hand, resulting in a judgment against a party, could be reviewed in this court on a claim that on account of such error due process of law had not been given him This cannot be maintained."

In *Hallinger* v. *Davis*, 146 U. S. 314, l. c. 320, 36 L. Ed. 986, 13 S. Ct. 105, this court said:

> "This requirement of the Constitution is met if the trial is had according to the settled course of judicial proceedings. Due process of law is process due according to the law of the land. This process in the states is regulated by the law of the state."

In *L. & N. Ry. Co.* v. *Woodson*, 134 U. S. 614, 33 L. Ed. 1032, the contention was made that a Tennessee statute forbidding the granting of more than two new trials in the same

cause on the same facts was in conflict with Amendment XIV to the Constitution of the United States. This court held:

> "Courts rarely grant a new trial after two verdicts upon the facts of favor of the same party, except for error of law, and the Statute, in the interest of the termination of litigation, makes that imperative which would otherwise be discretionary. (Citing cases.)
>
> "We can perceive nothing in the Statute thus applied which amounts to an arbitrary deprivation of the rights of the citizen, and concur with the Supreme Court of Tennessee that this Act, which had been in force for more than sixty years before the adoption of the Fourteenth Amendment, was not invalidated by it, while the Fifth Amendment had no application whatever."

II

There is no provision of the Constitution or Statutes of the United States which gives the Appellants the right to maintain jointly in the courts of Missouri, the instant suit for their alleged cause or causes of action and no rights under the Constitution or laws of the United States were denied to Appellants by the holding of the court that there was a misjoinder of parties plaintiff. (Appellants' Assignment of Errors numbers 20, 33 and 34)

The premise underlying the last mentioned Assignments of Error is that appellants had some right both created and protected by Federal law, to bring and maintain jointly, the instant action. They have entirely failed to demonstrate any such right.

All that the Supreme Court of Missouri has decided, in the instant case, is that under the applicable law appellants had no right to maintain *jointly* the instant suit. The trial court sustained the demurrers on the one ground of misjoinder of parties plaintiff (R. 401, 421-423). The Mis-

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souri Supreme Court in its opinion (193 S. W. 2 588, l. c. 591, 592) held that:

> "Judge Ridge sustained the demurrers on the sole ground of misjoinder of parties, but the demurrers also attacked the petition for misjoinder of alleged causes of action and for failure to state a cause of action. We think the reason assigned by the trial court is sufficient, but his ruling can be sustained on the other grounds mentioned. • • •
>
> "None of these assignments is germane to the question of whether the Fifth Amended Petition contains a *misjoinder of parties plaintiff* or fails to state a *joint* cause of action. (Emphasis added.)

The ground of failure to state a cause of action as sustained by the opinion quoted, thus relates solely to the failure to state a cause of action in favor of plaintiffs jointly. *Fadler* v. *Gabbert*, 333 Mo. 851, l. c. 863, 63 S. W. 2d 121, l. c. 127; *Akins* v. *Hicks*, 109 Mo. App. 95, l. c. 99, 83 S. W. 75, l. c. 76. Counsel for appellants explicitly requested the court to determine whether or not the petition states a cause of action as to *either* plaintiff. This the trial court did not do (R. 401, 422). Consequently, there was no decision against the validity of Sections 1979, 1980 and 1981, U. S. R. S. (Secs. 43, 47 and 48, Title 8 U. S. C.) or against the right of either appellant to maintain an action thereunder. The decision was that they had no right under the applicable Missouri law of procedure to join in such an action.

Appellants rely, in their argument as to the right of joinder, which is all that is pertinent here, on cases such as *Wells* v. *Davis*, 303 Mo. 388, a suit by an administratrix alone, under the Federal Employees' Liability Act and various cases in which it is claimed that defendant parties have been held by Federal decisions to be entitled to join in actions grounded upon the Federal Civil Rights Acts.

Wells v. *Davis, supra,* is specifically not in point on the question of alleged right of joinder since it was prosecuted by the administratrix alone. It does, however, give point to a distinction which is fatal to the theory of appellants. *Wells* v. *Davis* points out clearly that the Federal Employees' Labor Act vests the right of action granted, *in the personal representative* as a part of the law itself. The act vests the appointed representative with all the rights given thereunder (303 Mo. l. c. 404). The Federal Civil Rights Acts relied on do not specifically vest any person in a representative character with the rights of action created or make any right of joinder a part of the cause of action. R. S. Section 1979, Title 8 U. S. C. Sec. 43, gives the liability to "the party injured." Section 1980 R. S. Title 8, Sec. 47 *id.*, specifies "the party so injured or deprived." Section 1981 R. S. Title 8 Sec. 48 *id.*, awards the recovery "to the party injured or his legal representative"; but none of the three sections creates any right of joinder, or attempts to abrogate in any respect the civil procedure of the State in whose courts an action under Federal sections may be brought.

Appellants choose the state forum. As an incident they were entitled to any advantages, and burdened by any disadvantages, as to the law of procedure, which that choice involved. *Mo. ex rel* v. *Taylor,* 266 U. S. 200, 69 L. Ed. 247, 45 S. Ct. 47, 42 A. L. R. 1232, l. c. 1235; *Minneapolis & St. Louis R. Co.* v. *Bombolis,* 241 U. S. 211, 221, 60 L. Ed. 961, 965, 36 S. Ct. 595, Ann. Cas. 1916 E 505, 506; *Niehaus* v. *Jos. Greenspon's Son Pipe Corp.,* 237 Mo. App. 112, 164 S. W. 2 180, l. c. 186; *Rockwood* v. *Crown Laundry Co.,* 352 Mo. 561, l. c. 564, 565, 178 S. W. 2 440, l. c. 442, 443.

No right of joinder being conferred upon appellants by the Federal statutes on which they rely, they are subject to the applicable rules of local practice, though claiming a

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right of action under Federal statutes. In the *Bombolis* case, *supra*, this court made a basic application of that principle, by holding that local courts are entitled to act under a local practice permitting less than a unanimous verdict, in actions to enforce rights under Federal statute like the Employees' Liability Act, notwithstanding the requirement of the Seventh Amendment to the United States Constitution that trials by jury be according to the course of common law, *i. e.*, by unanimous verdict. On questions of joinder, the Missouri appellate courts have rightfully acted upon that principle in cases arising under the Fair Labor Standards Act of 1938, Title 29, U. S. C. Secs. 201-219. *Niehaus* v. *Jos. Greenspon's Son Pipe Corp., supra, Rockwood* v. *Crown Laundry Co., supra.* Except in matters governed by the Federal Constitution or by Acts of Congress, the law of the state is to be applied, whether it be declared by local statute or by the decision of its highest court. *Erie R. Co.* v. *Tompkins,* 304 U. S. 64, 82 L. Ed. 1188.

Under the applicable law of Missouri, the appellants could not join in bringing or prosecuting the instant action. In the *Niehaus* case, *supra,* the plaintiffs, as husband and wife, joined in the action, each asserting his or her own individual right of recovery for unpaid minimum wages, overtime, damages and attorneys fees, under the Fair Labor Standards Act. The St. Louis Court of Appeals, commented that under local laws and practice, such two causes of action, neither of which affected both plaintiffs nor arose out of the same transaction, could not be commingled as though a single cause of action were involved, nor even stated as separate counts in one petition. It further held that the case did not purport to be a class suit, and had it been such, could not have been maintained at law. The Supreme Court of Missouri approved the ruling in the

Niehaus case by citing it as a precedent in *Rockwood* v. *Crown Laundry Co., supra.* The plaintiffs, husband and wife, in *Picking* v. *Pa. R. Co.*, 151 F. (2d) 240, upon which appellants rely, could not have maintained their suit in a Missouri State court under the foregoing applicable Missouri authorities. Their petition, like that in the instant suit, was so voluminous, illogical and obscure that it was indicated the pleadings should be so amended as to shape the issues, but under the law, rightly applied in this case it would be impossible, so to amend the complaint as to state a valid cause of action, in a Missouri State Court.

The Fair Labor Standards Act in Title 29 U. S. C., Sec. 216 provides that the action thereunder may be maintained in any court of competent jurisdiction by one or more employees for and in behalf of himself, or themselves and other employees similarly situated and yet the Supreme Court of Missouri in applying the law of joinder of plaintiffs applicable in this case, held that the local procedure governed. In *Rockwood* v. *Crown Laundry Co.*, 352 Mo. 561, 178 S. W. 2d 440, it was held:

> "the personal action of plaintiff may not be united with those brought by her in a representative capacity,"

although the action was brought under the Federal Fair Labor Standards Act containing the provision thereof last mentioned. Since the Civil Rights Acts contain no provision authorizing joinder, as pointed out above, the reasoning in the *Crown Laundry* case *supra,* that plaintiff individually is not interested in nor a necessary party to the cause of action asserted in her representative capacity for and on behalf of her fellow employees similarly situated and vice versa, is controlling here. In *Reppetto* v. *Walton*, 313 Mo. 182, 281 S. W. 411, 415, 416, the Supreme Court of Missouri held that the executrix could not join with herself

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in her individual capacity as a plaintiff to recover from the defendant, moneys alleged to be due the plaintiff from the estate of the deceased of which one of the plaintiffs was executrix. That decision reaches the present case. Appellants cite *Georgia* v. *Pa. R. Co.*, 324 U. S. 439, 89 L. ed. 1051. In the opinion therein this court said of the capacities in which plaintiff sued, that:

> "Georgia sues in four capacities only two of which we need mention: (1) in her capacity as a quasi-sovereign or as agent and protector of her people against a continuing wrong done to them; and (2) in her capacity as a proprietor to redress wrongs suffered by the State as the owner of a railroad and as the owner and operator of various institutions of the State."

It is manifest there is nothing in this case which by any stretch of the imagination could be held to authorize the joinder by an individual, of herself as an executrix in the same action. The cited case invoked the original jurisdiction of this court. In addition to its capacity as a sovereign state, plaintiff sued as a quasi-sovereign or protector of her people against a public wrong. This decision could have no proper application to a case brought in the State Court under the Federal Civil Rights Act, which vests no specific person or entity with a right of action as a part of the terms of the statute and contains no joinder provisions.

Appellants apparently cite *Bell* v. *Hood*, 90 L. ed. 758, 66 Sup. Ct. 773, as going to the validity of a cause of action alleged under the Civil Rights Act. In that case the action had been brought in a district court of the United States and the question passed upon was as to the sufficiency of the allegations of the complaint to invoke the Federal jurisdiction, and this court, through Mr. Justice Black, pointed out not only that the issue as to the sufficiency of the pleaded facts to authorize a recovery was not material

to the determination of the jurisdictional question, but also that the issue of law as to whether a money recovery for damages could be had in the action under the Federal law relied upon, had never been determined by this court. No question as to the number of plaintiffs, or their respective capacities, or their right to join as plaintiffs in the action, was passed upon either directly or indirectly in *Bell* v. *Hood*, supra.

Many of the contentions made by appellants herein in their Jurisdictional Statement are entirely pointless and irrelevant because they proceed upon the insupportable theory that the Supreme Court of Missouri in its opinion 193 SW 2 588 l.c. 592) passed upon all of the allegations of the Fifth Amended Petition to hold that same stated no cause of action at all, (as distinguished from failure to state a *joint* cause of action), and affirmed a judgment which had the legal effect of barring any further action on the alleged facts. That court (l.c. 592) referred by citations, to the cases in which the principal substantive contentions of the appellants had already been litigated, and raised in their respective Assignments of Error in applying to this court for certiorari, which this court denied as long ago as October 9, 1933, 290 U. S. 642, 78 L. ed. 558 (leave to petition for rehearing denied December 11, 1933, 290 U. S. 602, 78 L. ed. 528) and May 18, 1936, 298 U. S. 675, 80 L. ed. 1397, respectively. We have qouted from the opinion of the Supreme Court of Missouri at the beginning of this point showing that its decision went solely to the right of appellants to maintain jointly the instant action and we have shown that the effect of the affirmed judgment of dismissal of the pending petition was not that of a judgment on the merits, and did not preclude bringing or maintenance of another action on the facts alleged, by our separate point to that effect.

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Appellants complain in their motion for rehearing in the Supreme Court of Missouri, that it had overlooked *Fadler* v. *Gabbert*, 333 Mo. 851, 63 SW 2 121, and *Scott* v. *Alton Bank & Trust Company*, (Mo.) 175 S W 920, in ruling on the question of misjoinder of plaintiffs, or failed to apply same as controlling decisions of the court. In the opinion however, (193 SW 2 588) the court construed the opinion in the Fadler case as holding that misjoinder of parties, though not listed as a specific ground of demurrer in the Missouri statute, was in fact such a ground because where there is a misjoinder "the petition does not state a cause of action." In *Scott* v. *Alton Bank & Trust Company*, supra, the grounds of (1) defect of parties plaintiff and (2) failure to state facts sufficient to constitute a cause of action, were interposed by demurrer against each count of the petition and the court ruled that "the defendants' demurrer to petition was properly sustained, as no joint right of action appears from the petition." (l.c. 925.) This but clarifies the ruling in the instant case and expresses the reason why no cause of action is stated, i.e., no cause of action was pleaded in favor of the plaintiffs jointly, as neither had any right or interest in the cause of action of the other. This is well expressed in *Neiderburg* v. *Golluber*, (Mo.) 162 SW 2 592, wherein the Missouri Supreme Court says of the identical situation in the instant case, one attempting to join individually with himself as administrator of the estate of his deceased spouse, that:

> "Accordingly, plaintiff as administrator would be entitled to the rent from the real estate prior to Effie V. Niederberg's death (Sec. 94, supra), but would have no interest in the rent or income derived from such real estate after her death. On the other hand, plaintiff, as the widower, would have no right to recover or join in the recovery of the rent or income derived from the property by defendants prior to the

death of Effie V. Niederberg. The widower and heirs would be entitled to all income and rental value after her death, unless required for purposes of administration, (citing statutes). The plaintiffs, therefore, are not 'united in interest' in their claim for rental value of this alleged trust real estate, (citing statutes). Nor are they both necessary parties to a 'complete determination or settlement of the question involved.' Sec. 852 R. S. 1939 Mo., R. S. A. No. 852. Nor are both plaintiffs (legally) interested in the subject matter, and in obtaining the relief demanded so as to be properly joined as plaintiffs under Sec. 851, R. S. 1939 Mo."

The applicable Missouri law was that the appellants herein could not join in the same action. But if the trial court and the Supreme Court of Missouri had erred in holding to the contrary, it was purely a question of state practice upon which their decisions were final. *U. S.* v. *Pink*, 315 U. S. 203, 86 L. ed. 796, 62 S. Ct. 552, where, in reply to a suggestion that this court on certiorari to the Supreme Court of New York inquire into a question of local procedure, this court said:

> "That is distinctly a question of state law on which New York has the last word."

III

Appellants' claim that the demurrers to the Fifth Amended Petition were sustained without notice or hearing is not sustained by the record.

(Appellants' Assignment of Error No. 16. Appellants' Jurisdictional Statement, pp. 3 and 19.)

The record shows these demurrers to Plaintiffs' Fifth Amended Petition were on file prior to the 6th of December, 1944 (Record 389-391, 393). On December 8th, 1944, Appellants being represented in court by Mr. O'Donnell,

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Appellee Weede applied to the court for permission to amend her separate demurrer and the court permitted the same to be filed (Record 393). The court set the hearing on the Commerce Trust Company separate demurrer and the Weede demurrer for hearing on Wednesday, the 13th day of December, 1944 (Record 389-391,393). On December 13, 1944, the court met with all parties represented. On that day the court disposed of motions of Kopp, Weede, and Howard to strike out Plaintiffs' replies (Record 416-419). No ruling was made on the demurrers on that date.

The record is silent as to any hearings on the demurrers until the order sustaining them on December 30, 1944. This is without significance, as it is not customary to record in the records arguments of counsel on days where the court made no ruling to be recorded in the court records. That such hearings were held is clearly shown by the record in this case. The bill of exceptions prepared by Appellants shows (Record 419) that "the cause came on regularly for hearing" on December 30, 1944, that the Appellants were represented thereat by Mr. Martin J. O'Donnell (Record 420). By leave of court Mr. O'Donnell amended Plaintiffs' Fifth Amended Petition by striking therefrom Paragraph 45 (Record 420-422, 423). Defendants, by leave of court, thereupon refiled their demurrers to said Fifth Amended Petition as then amended (Record 420-423). At that juncture the record shows the following occurred (Record 420-421):

> "Mr. O'Donnell: I want to make a short record to aid the Court. If the Court please, in the performance of our duty to the plaintiff, we feel that it is our duty to call attention to the fact that now that the petition has been amended by eliminating a part of the grounds of their objection, and since the Court hasn't had any argument, hasn't made up its mind as to whether or not the petition states a cause of action as to either party,

then we respectfully suggest that the matter be held until the Court has a chance to look into the whole proposition, and make up its mind as to whether or not the petition states a cause of action. Also, since the petition has been just amended and they have just filed their demurrers, under the rules of the Court I believe we have a right to—I don't want to be taking any technical advantage, but I think it is my duty to the plaintiff to suggest that we are entitled to two days' notice, because there is a new question in the case, it is a new petition.

"The Court: I do not intend to make any such ruling as that. It does seem rather futile to me to have made up my mind on this one point, which was so apparent to me in this case from the pleadings, when I asked for the briefs, to have additional number of days' arguments and submission of briefs here. I understand counsel for Defendants are willing to rely upon this one ground that is stated in their demurrer.

"Judge Goodrich: We think that ground is well taken.

"The Court: I am going to make an order sustaining the demurrer on that one ground.

"Mr. O'Donnell: In view of the fact that the Court has indicated his notion without announcing the ruling——

"The Court: I have announced my ruling already, that I am sustaining the demurrers on the grounds of misjoinder of parties plaintiff.

"(To which ruling and action of the Court the Plaintiffs, by their counsel, at the time duly excepted and still except.)"

The language of the court shows there had been briefs and arguments directed, at least, to the issue of misjoinder of parties plaintiff. That such is the case will not be denied by Appellants' counsel. The court had made up his mind on that issue and had already indicated his views. We submit the language of Mr. O'Donnell shows he was seeking further hearing on the propositions of whether the

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tion stated a cause of action as to either party and as to ther the petition stated a cause of action (R. 420). re was no request for further arguments on the issue of joinder of parties plaintiff. The amendment to Plain-' Fifth Amended Petition just effected by striking out agraph 45 was immaterial to the issue of misjoinder arties plaintiff. That this is so is shown by the opinion he Supreme Court of Missouri, *Moffett* v. *Commerce st Co.*, 193 S. W. 2d 588, where the Court said: (l. c. 591)

"The demurrers to the fifth amended petition were filed on or before December 6, 1944. Then appellants filed a reply on the theory that the demurrers were really answers, which reply was after a hearing stricken out on respondents' motions. Then on December 30, 1944, with all parties present by counsel, the demurrers were presented to Judge Ridge. Appellants, by leave of court, withdrew paragraph 45 of their fifth amended petition, and respondents refiled their demurrers. Appellants requested at least two days' delay on the ground that the demurrers had just been filed. The court, in the exercise of proper discretion, denied this request. Kuh v. Garvin, 125 Mo. 547, 28 S. W. 847, loc. cit. 851. The withdrawal of paragraph 45, which related to a suit brought by respondent Kopp against Mrs. Moffett, in no way affected the point made in the demurrers as to misjoinder of parties plaintiff or failure to state a cause of action. We see no violation of the rules."

he self-serving statements of counsel inserted in the ord at Page 406 and quoted by Appellants on Page 19 their Jurisdictional Statement to the effect that these urrers were sustained "without notice thereof for hear- or jurisdiction so to do" are disproved by the record lf.

t is therefore apparent that Appellants' counsel were en full opportunity to brief and argue the issue of mis-

joinder of parties plaintiff, the only issue ruled by the Court, and that they took full advantage of that opportunity. They were satisfied to the extent that they requested no further hearing on that issue.

To demonstrate that the trial court took the same view as to the ruling he made which was later approved by the Missouri Supreme Court, we quote the following from the record (Record 422):

> "Mr. O'Donnell: We respectfully request the Court to determine the fact whether or not the petition states a cause of action as to either plaintiff.
>
> "The Court: If the defendants are not insisting on those other grounds, I will just overrule the other grounds of the demurrer.
>
> "Mr. Harding: If Your Honor please——
>
> "Judge Goodrich: I think on that the law is that sustaining a demurrer on the ground of misjoinder of parties plaintiff has the effect of saying that there is no joint cause of action. That is the law.
>
> "The Court: That is the law. There is no question about it."

IV

Appellants' contention that the Missouri Supreme Court erred in not deciding the case on appeal under the new code of civil procedure although the case was tried below under the old code before the effective date of the new code is without merit and raises no Federal question. (Appellants' Assignment of Errors No. 22, Appellants' Jurisdictional Statement, pp. 38-39.)

Appellants next contend that as the new Missouri Code of Civil Procedure had become operative prior to the time this case was decided by the Supreme Court of Missouri on appeal that court was bound to apply the new Civil

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Code and reverse the cause even though the case was properly tried under the Code in force at the time the Circuit Court sustained the demurrers.

In the first place, this particular point was not raised in Appellants' briefs or in their motion for rehearing or to transfer to the court *in banc* filed in the Missouri Supreme Court. Even in their motion for a rehearing or to transfer to the court *in banc* they complain only of errors originating in the trial court and make no reference to any claimed error originating in the Missouri Supreme Court. That contention was never called to the attention of the Missouri Supreme Court in any manner and that court was never given an opportunity to pass on this question. For that reason alone, such question, now belatedly sought to be raised, is not before this court. The rule is stated by this court in *Hunter Company* v. *McHugh*, 320 U. S. 222, 227, 64 S. Ct. 19, 21, as follows:

> "• • •, this Court, is reviewing on appeal the judgment of the State Supreme Court is not free to, and will not adjudicate the constitutionality of orders No. 28-C and No. 28-C-10 where the state court whose judgment is under review has had no opportunity to pass upon their validity under state law or the Constitution of the United States. See McGoldrick v. Compagnie Generale, 309 U. S. 430, 433 et seq., 60 S. Ct. 670, 672, 84 L. Ed. 849."

The reason for the requirement that this Court will not ordinarily consider a question not passed on by the State Court was well stated by this Court in the case of *Huddleston* v. *Dwyer*, 322 U. S. 232, 237, 64 S. Ct. Rep. 1015, as follows: (l. c. 1018)

> "We have often had occasion to point out the importance to the orderly judicial administration of state laws in the federal courts that questions of state law

required to be decided here should first be considered and decided by the state or federal court from which the case is brought to this Court for review. Dorchy v. Kansas, 264 U. S. 286, 290, 291, 44 S. Ct. 323, 324, 325, 68 L. Ed. 686; State of Missouri ex rel. Wabash R. Co. v. Public Service Com. 273 U. S. 126, 131, 47 S. Ct. 311, 313, 71 L. Ed. 575; Ruhlin v. New York Life Ins. Co., 304 U. S. 202, 206, 207, 58 S. Ct. 860, 861, 82 L. Ed. 1290; New York ex rel. Whitman v. Wilson, 318 U. S. 688, 690, 691, 63 S. Ct. 840, 841, 87 L. Ed. 1083. The decision of the highest court of a state on matters of state law are in general conclusive upon us, and ordinarily we accept and therefore do not review, save in exceptional cases, the considered determination of questions of state law by the intermediate federal appellate courts, cf. Ruhlin v. New York Life Ins. Co., supra. When we are called upon to decide them, the expression of the views of the judges of those courts, who are familiar with the intricacies and trends of local law and practice, if not indispensable, is at least a highly desirable and important aid to our determination of state law questions. This Court will not ordinarily decide them without that aid where they may conveniently first be decided by the court whose judgment we are called upon to review. See, e.g., Ruhlin v. New York Life Ins. Co., supra; Rosenthal v. New York Life Ins. Co., 304 U. S. 263, 264, 58 S. Ct. 874, 875, 82 L. Ed. 1330; West v. A. T. & T. Co., 311 U. S. 223, 241, 61 S. Ct. 179, 185, 85 L. Ed. 139, 132 A. L. R. 956; Klaxon Co. v. Stentor Electric Mfg. Co., 313 U. S. 487, 497, 61 S. Ct. 1020, 1022, 85 L. Ed. 1477; Meredith v. Winter Haven, supra."

The question here involved is one of construction of the Missouri Statutes establishing a new code of civil procedure. With reference to its applicability to proceedings had under the old code prior to the effective date of the new, we believe this is a State matter involving no federal ques-

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tion. In the case of *Midland Realty Company* v. *Kansas City Power & Light Company*, 300 U. S. 109, 110, 113, 57 S. Ct. Rep. 345 and 346, the court said:

> "The questions for decision are whether, as construed in this case by the highest court of Missouri, the statutes of that State regulating public utilities violate article 1, section 10 of the Constitution of the United States, declaring that 'No State shall • • • pass any • • • Law impairing the Obligation of Contracts,' or section 1 of the Fourteenth Amendment declaring 'nor shall any State deprive any person of life, liberty or property, without due process of law.'
>
> "These questions are to be decided upon the construction that the state supreme court put upon the statute."

Section Three of the new Missouri Code here involved, Laws of Missouri 1943, page 357, Mo. Rev. St. Ann., Section 847.3, is as follows:

> "This code will take effect on January 1, 1945. It governs all proceedings in actions brought after it takes effect and also further proceedings in all actions then pending, except to the extent that in the opinion of the court its application in a particular action pending when this code takes effect would not be feasible or would work injustice, in which event the former procedure applies."

The Missouri Supreme Court in the present case in ruling against Appellants' then contention that this statute had potential existence prior to its effective date held that it affected only proceedings after the effective date of January 1, 1945, which was subsequent to the entry of the judgment of the trial court. The express language of the statute quoted above would seem to permit of no other construction.

On this point the Missouri Supreme Court said in this case (*Moffett* v. *Commerce Trust Company*, 193 S. W. (2d) 588, 589-590:

> " (1) Appellants are in error in construing the new Civil Code, Mo. Laws, 1943, pp. 353-397, Mo. R. S. A. Sec. 847.1 et seq., as declaring what the law was at the date of its passage. They reach this result by emphasizing the word 'is' in the sentence 'misjoinder of parties *is* not a ground of demurrer to an action,' but they overlook further provisions of the Code, Sec. 3, to wit: 'This code will take effect on *January 1, 1945*. It governs all proceedings in actions brought *after* it takes effect and also *further* proceedings in all actions then pending, except * * *.' (Emphasis ours.) Section 922, although now repealed, was in force on December 30, 1944, the date Judge Ridge ruled on the demurrers."
>
> (Italics by the court.)

But even if this question had been presented to the Missouri Supreme Court and actually ruled upon by it, the result would necessarily have been the same. It is the well-established Missouri rule that procedural statutes operate prospectively only after their effective date as to future proceedings in actions pending on the effective date of such statute. The Missouri rule is so well stated in the leading case of *Lober* v. *Kansas City*, 339 Mo. 1087, 74 S. W. (2d) 815, that we quote liberally therefrom as follows: (l. c. 826)

> " (15) It should be observed, however, that even in matters of procedure a change in the law by new statute or authoritative court decision does not act prospectively or in the future only in the sense that the change does not apply to cases already pending. Such change does usually apply to cases then pending as to future proceedings therein, but does not make void or invalid the proceedings already had if same were in conformity to the law as it was before the

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change. Clark v. Railroad, 219 Mo. 524, 533, 118 S. W. 40, wherein the court quoted the correct rule in this respect from 2 Lewis' Sutherland, Statutory Construction (2d Ed.) Sec. 674, to-wit: 'No person can claim a vested right in any particular mode of procedure for the enforcement or defense of his rights. Where a new statute deals with procedure only, prima facie it applies to all actions—those which have accrued or are pending, and future actions. What was before a subject of equitable relief may be made triable by jury without affecting vested rights. If before final decision a new law as to procedure is enacted and goes into effect, it must from that time govern and regulate the proceedings. But the steps already taken, the status of the case as to the court in which it was commenced, the pleadings put in, and all things done under the late law, will stand, unless an intention to the contrary is plainly manifested; and pending cases are only affected by general words as to future proceedings from the point reached when the new law intervened. If what has been done under the old law is bad or insufficient (or vice versa) under that law it remains so.' And so this court correctly ruled in State ex rel. v. Haid, 330 Mo. 1093, 52 S. W. (2d) 183, 186, that: 'It is a well-settled rule that, if before final decision in a case a new statute as to procedure goes into effect, it must from that time govern and regulate the proceedings. * * * And a like result is produced by a change in the construction of a statute relating to procedure by a court of last resort.' This is the extent to which this court has gone and no further."

This judgment had been entered and an appeal taken by appellants on the same day of the judgment, (to preserve their rights on appeal under the old Code which gave them greater latitude as to length of briefs and other advantages), all prior to the effective date of the new Code on January 1, 1945. There was thereafter no proceedings had in the Circuit Court and under the established rule in

Missouri the changes wrought by the new Code did not invalidate the proceedings theretofore taken in the Circuit Court which were valid under the old Code then in force.

In the case of *Anson* v. *Tietze*, 190 S. W. (2d) 193 (not yet officially reported), the Missouri Supreme Court said: l. c. 198)

> "It is well settled that when a new statute as to procedure goes into effect before the final decision of a case it governs and regulates matters of procedure therein subsequent to its effective date. Clark *v.* Kansas City, St. L. & C. R. Co., *v.* Haid (Banc), 330 Mo. 1093, 1100 (II), 52 S. W. (2d) 183, 186 (3-5)."

That is the last expression of the Missouri Supreme Court we have found and confirms its adherence to the rule that a change in procedure affects only "matters of procedure therein subsequent to its effective date."

In the case of *Crawford* v. *Arends*, 351 Mo. 1100, 176 S. W. (2d) 1, the Court, *in banc*, held an adopted child, claiming as a lineal descendant under a will, not entitled to recover. In a motion to modify or clarify the opinion, it was called to the attention of the Court that five days before the opinion of the Court was delivered a new statute had been enacted which, it was claimed would allow the claimant to recover. The Court wrote a per curiam opinion overruling said Motion to Modify or Clarify Opinion in the course of which the Court said: (l. c. 7)

> "It will be noticed the section says the adopted person 'shall hereafter be deemed and held,' etc. The word 'hereafter' as thus used refers to the date when the Act takes effect. 19 Words and Phrases Perm. Ed., page 389. It is obvious that the construction of this statute and the respondent's rights under it were not and could not have been a matter for adjudication in the trial court; and since this record is here by appeal we are confined to the issues in that court.

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We cannot treat the cause as an original proceeding and determine the meaning and effect of the statute."

In the case of *Simpson* v. *Stoddard*, 173 Mo. 421, cited by Appellants on this point is clearly distinguishable for the statute there involved was a curative statute expressly enacted for the purpose of operating retrospectively. Exactly the opposite is true here as the statute itself limits its application to matters arising prospectively.

Furthermore, Section 3 of the Missouri Code for Civil Procedure quoted *supra* as to proceedings subsequent to its effective date authorizes the trial court, in its discretion, to follow the old procedure in any case pending prior to the effective date of the new Code whenever, in the opinion of such court, it "would not be feasible or would work injustice." Therefore, even if the case were reversed and remanded, the trial court still would be authorized to apply the old procedure in the exercise of this discretion.

Furthermore, Appellants have not shown they were prejudiced by the application of the old Code with respect to the joinder of parties and causes of action. In fact the contrary appears from the opinion of the Supreme Court, *Moffett* v. *Commerce Trust Company*, 193 S. W. (2d) 588, wherein the Court says: (l. c. 591)

> "Judge Ridge sustained the demurrers on the sole ground of misjoinder of parties, but the demurrers also attacked the petition for misjoinder of alleged causes of action and for failure to state a cause of action. We think the reason assigned by the trial court is sufficient, but his ruling can be sustained on the other grounds mentioned. Hartvedt *v.* Harpst, Mo. Sup. 173 S. W. 2d 65, loc. cit. 68; Bushman *v.* Barlow, 321 Mo. 1052, 15 S. W. 2d 329, 330."

Said Section 3 of the Missouri Code for Civil Procedure was modeled on Rule 86 of the Federal Rules for Civil

Procedure. In the aspect now being considered we are confident the two call for the same construction.

In the case of *Doyle* v. *Loring*, 107 F. (2d) 337, the District Court dismissed the bill for lack of jurisdiction over the subject matter and for lack of proper venue. In affirming that ruling the United States Circuit Court of Appeals for the 6th Circuit said: (l. c. 340)

> "Appellants insist that the application of Rules 17(b), 4(d) (1), 4(d) (7), 12 (h), 28 U. S. C. A. following Section 723c, requires a result different from that reached by the District Court. We are not required to enter into a detailed discussion of the rules. The Rules of Civil Procedure became effective while the suit was pending and whether they should have been applied was in the discretion of the Court (Rule 86)."

Application for certiorari to this Court in that case was denied, 309 U. S. 686, 60 S. Ct. Rep. 808.

Application of the previous Rules of Procedure, under similar conditions, have been approved by the Federal Courts in construing the Federal Rules of Civil Procedure which are the parent of Section 3 of the new Missouri Code.

In the case of *City of El Paso* v. *West*, 104 F. (2d) 96, the United States Circuit Court of Appeals for the Fifth Circuit in a memorandum opinion on Motion for Rehearing said: (l. c. 97)

> "Appeal is also made to the new rules of Civil Procedure which abolished the old forms of action and provide that there shall be but one.
>
> "This case was filed and tried in the District Court before the Rules of Civil Procedure existed. The pleadings must be interpreted according to the laws then obtaining."

In that case an application for certiorari to this Court was denied, 308 U. S. 587, 50 S. Ct. 111.

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In the case of *Frigorifico Wilson De La Argentina* v. *Weirton Steel Company*, 31 Fed. Supp. 218, the United States District Court for the Northern District of West Virginia sustained a demurrer to the 5th declaration, saying: (l. c. 219)

> "This declaration has been tested by the common law rules of pleading, as applied in the Courts of West Virginia under the General Conformity Act, 28 U. S. C. A., Section 724, because said declaration was filed prior to the adoption of the Federal Rules of Civil Procedure, 28 U. S. C. A., following Section 723c. See Rule 86. Of course all future pleadings herein, filed by either party, must conform to the new rules."

Upon appeal, that decision was affirmed by the United States Circuit Court of Appeals for the Fourth Circuit, but without discussing the particular point, 62 F. (2d) 677.

Under both the Missouri and Federal authorities, the Missouri Supreme Court committed no error in deciding this case on appeal on the basis of the governing authority being the old procedure under which the case was tried in the court below. The point is not before this Court, but, if it were, we submit there is no merit in Appellants' contentions and no substantial Federal question is presented which could give this Court jurisdiction.

V

There was no error by Division 1 of the Supreme Court of Missouri in denying the application of appellants for transfer of the instant cause to the Supreme Court of Missouri en banc; appellants could not claim such transfer as a matter of right; and there was no violation of the equal protection clause of Sect. 1 of Amendment XIV to the United States Constitution.

The Supreme Court of Missouri *en banc* does not have superintending control over a division of that court (Appellants' assignment of error number 37). Appellants, in their Jurisdictional Statement, say that "Said division I of the Missouri Supreme Court is not the highest court in Missouri. Appellants sought by said motion to transfer the case to the Court En Banc, which is the highest State Court." (Citing cases.)

In one sense, there is a legal procedure under which, in certain instances, a cause may be transferred to the Missouri Supreme Court *en banc* from a division thereof, but under the law and the facts in this case and for the purposes of this appeal, Division 1 of the Missouri Supreme Court was the highest court of the State in which a decision of this case could be had by the appellants. Under the law the decision of Division 1 of that court against transfer of a cause to the court *en banc* was as conclusive upon the appellants as it was upon the court, as distinguished from the two divisions in which the Judges thereof sit. The court *en banc* cannot, on application to it, by the losing party, review a decision of a division that no Federal question is involved in the case, and refusing to transfer the case to the court. *Scheufler* v. *Mfg. Lumb. Underwriters*, 349 Mo. 855, 163 S. W. 2, 749, 750; certiorari denied 317 U. S. 684, 87

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L. Ed. 548. *State* v. *Duestrow*, 137 Mo. 44, 91, 38 S. W. 544, 39 S. W. 266, l. c. 267, 268.

In *State* v. *Duestrow, supra*, the Supreme Court of Missouri, *en banc*, aptly stated the issue of law (39 S. W. l. c. 267) thus:

> "The only question directly presented for our consideration on this motion is whether the court, sitting in banc, has power, under the amendment to the constitution adopted in 1890, to review the action of a division of the court, and determine whether a federal question is involved, and to order a transfer of a case to court in banc after such division has unanimously decided that there is no federal question in the case."

The Court, after referring to the constitutional provisions involved, in Section 4 of the 1890 Amendment to the Missouri State Constitution reading as follows:

> "When the judges of a division are equally divided in opinion in a cause, or where a judge of a division dissents from the opinion therein, or where a federal question is involved, the cause, on the application of the losing party, shall be transferred to the court for its decision; or, where a division in which a cause is pending shall so order, the cause shall be transferred to the court for its decision.",

proceeds with its opinion thus:

> "Does this section give to the court in banc the power claimed by defendant under his motion? We are of the opinion that it does not. It cannot be said that this section gives to the supreme court superintending control over a division." * * *
>
> "The existence or nonexistence of a federal question in a cause may sometimes be in doubt, and judges may differ in their opinion on the question; yet a division of the court is fully as competent to determine that question as the more important one involving the merits of the case, in which the power is not, and, indeed, cannot

> be, disputed. Its unanimous judgment on incidental questions is also conclusive. In this case division 2 heard the appeal on its merits. The application to transfer was properly made to it. The right to a transfer depended upon whether a federal question was involved. That was a question for that division to settle. It did so, by finding that no federal question was involved, or, as the application was denied, we must presume it so found. The court sitting in banc is given no power to review that decision. Defendant's motion is overruled."

In *Scheufler* v. *Mfg. Lumb. Underwriters, supra*, the Supreme Court of Missouri *en banc*, in holding that the constitutional amendment of 1890 does not give the Supreme Court *en banc* superintending control of a division of the court and that the court *en banc* cannot compel the transfer of a cause to the court *en banc* from a division thereof, says:

> "Ever since the decision of State *v.* Duestrow, 137 Mo. 44, 91, 38 SW 554, 39 SW 266 in 1896, it has been the settled law of this state that such motions must be filed in whichever of the two Divisions of this court has decided the case; *and that the court en banc cannot compel a transfer of the cause.* • • •
>
> "The Duestrow case, (137 Mo. loc. cit. 95, 38 S.W. 554, 39 SW. loc. cit. 268) squarely holds that *Sec. 4 of the Amendment does not give the court en banc superintending control over a Division.*
>
> "The Amendment of 1890 was adopted to expedite the work of the court by creating two divisions of concurrent jurisdiction, each with the separate power to adjudicate causes coming to the court; and with the further power to determine when causes before it, shall be transferred to the court en banc under Sec. 4 of the Amendment." (Emphasis added.)

As noted above, this Court denied certiorari in the last cited case.

Since the above decisions the State of Missouri in 1945 adopted a new Constitution but we submit the comparisons here made will show that the slight changes in phraseology in the new Constitution simply make for conciseness and clarity and that the decisions cited herein are fully as applicable to the new State Constitution as to the old.

The counter part of Sec. 4 of the Amendment of 1890 quoted above is Section 9 of Article V of the Missouri Constitution of 1945. It reads:

> "Sec. 9. Transfer of Causes to Supreme Court in Banc.—A cause in the supreme court shall be transferred to the court in banc when the members of a division are equally divided in opinion, or when the division shall so order, or on application of the losing party when a member of the division dissents from the opinion therein, or a federal question is involved, or pursuant to supreme court rule."

A learned annotator of the new Constitution comments that except for the concluding words "or pursuant to supreme court rule", the only substantial difference between Sec. 4 of the Amendment of 1890 and the last quoted new Section arises from the change in position within the section of the phrase "on application of the losing party."

The constitutional provisions with respect to the jurisdiction of the State court prior to the adoption of the 1945 Constitution were in a part of Section 12, Article VI, Missouri Constitution, 1875, which primarily created the St. Louis Circuit Court of Appeals, but also stated the jurisdiction of the State Supreme Court, and Sections 3 and 5 of the 1884 Amendments to the 1875 Constitution. Such pertinent provisions read:

> "Sec. 12. St. Louis Court of Appeals—jurisdiction—appeals to Supreme Court.—* * * Appeals shall lie from the decisions of the St. Louis Court of Appeals to the Supreme Court, and writs of error may issue from

the Supreme Court to said court in the following cases only; In all cases where the amount in dispute, exclusive of costs, exceeds the sum of two thousand five hundred dollars; in cases involving the construction of the Constitution of the United States or of this State; in cases where the validity of a treaty or statute of or authority exercised under the United States is drawn in question; in cases involving the construction of the revenue laws of this State, or the title to any office under this State; in cases involving title to real estate; in cases where a county or other political subdivision of the State or any State officer is a party, and in all cases of felony.

"Sec. 3, Amdt. 1884, provided, among other things, that 'the General Assembly shall have power by law * * * to increase or diminish the pecuniary limit of the jurisdiction of the court of appeals. * * *

"Sec. 5 Amdt. of 1884 reads as follows:

Sec. 5. Supreme Court, exclusive appellate jurisdiction of—In all causes or proceedings reviewable by the Supreme Court, writs of error shall run from the Supreme Court directly to the circuit courts and to courts having the jurisdiction pertaining to circuit courts, and in all such causes or proceedings, appeals shall lie from such trial courts directly to the Supreme Court, and the Supreme Court shall have exclusive jurisdiction of such writs of error and appeals, and shall in all such cases exclusively exercise superintending control over such trial courts."

The corresponding provisions of the 1945 Constitution are found in Section 3 of Article V thereof:

"Sec. 3. Jurisdiction of the Supreme Court.—The supreme court shall have exclusive appellate jurisdiction in all cases involving the construction of the Constitution of the United States or of this state, the validity of a treaty or statute of the United States, or any authority exercised under the laws of the United

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States, the construction of the revenue laws of this state, the title to any office under this state, the title to real estate, in all civil cases where the state or any county or other political subdivision of the state or any state officer as such is a party, in all cases of felony, in other classes of cases provided by law, and until otherwise provided by law, in all cases where the amount in dispute, exclusive of costs, exceeds the sum of seventy-five hundred dollars."

We think there is significance in the identity of the words drawn in question", with respect to the validity of a reaty or statute of the United States in Section 12, Article VI, Constitution 1875, and in Title 28, U. S. C., Sec. 344 Sec. 237, Judicial Code, amended).

It is also to be noted that the Supreme Court of Missouri olds that the word "involved" as used in the 1875 Constitution *in fixing the appellate jurisdiction* of the Missouri Supreme Court "implied that a constitutional question vas raised in and submitted to the trial court, and that uch court *had the opportunity to pass upon it.*" *Aufderheide* v. *Ice & Fuel Co.*, 319 Mo. 337, 4 S. W. 2d 776, l. c. 799; *Bennett* v. *Railway Co.*, 105 Mo. 642, 644, 16 S. W. 947, 948. This was in passing upon the procedural steps necessary to place jurisdiction in the Supreme Court of the State, and the only application here made is that when that jurisdiction has been acquired, and appellants claim that refusal to transfer the cause from the division to the court *en banc* violated a Federal right, the question being timely raised, the division of the court must determine whether an alleged Federal question is in fact involved in the record by proper procedure and then whether the alleged question is Federal in any sense.

In either case, under the cited decisions of the Missouri Supreme Court the question of transfer from division to the court *en banc* is strictly one of procedure of State law.

In *State* v. *Duestrow, supra,* cited and followed ever since 1896, where the application to transfer to the court *en banc* for an alleged Federal question was denied the Supreme Court *en banc* held that the unanimous decision of the three judges of Division 2 was final. Division 2 of the Supreme Court was "the highest court of a State in which a decision in the suit could be had." 28 U. S. C. Sec. 344 (Sec. 237, Jud. Code, Amended). In the instant case, the like final decision under the authorities cited was not only made by the unanimous concurrence of the four judges of Division 1 of the court, but it likewise was the judgment of a majority of the seven members of the entire court. Appellants could have no right under the Federal Constitution to control the law of Missouri as to what should be the highest court of the State in which a decision of the suit could be had. There could be no denial of equal protection of the law to appellants, because the supreme law of the State of Missouri vests in a division of its Supreme Court the judicial discretion to determine which cases decided in the division of the court involved a Federal question and which cases actually involved no such question. It might as well be argued that there was a denial of equal protection by the vesting of power in an appellate court to affirm or reverse cases on appeal.

In *A. T. & S. F. R. Co.* v. *Railroad Com.*, 283 U. S. 380, 75 L. Ed. 1128, this Court, through Chief Justice Hughes, said:

> "The decision of the state court is conclusive so far as the constitution and laws of the state are concerned."

In *Yazoo etc. R. Co.* v. *Mullins,* 249 U. S. 351, 63 L. Ed. 754, this Court, through Mr. Justice Brandeis, said:

> "Whether the case comes from a state court or a Federal court, this court will, for the purpose of de-

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termining whether the error found may have been prejudicial, examine the whole record; state questions being left to the decision of the state court in cases coming here from those courts."

In *Waters-Pierce Oil Co.* v. *Texas*, 212 U. S. 86, 53 L. Ed. 417, this Court held:

> "The jurisdiction of this court to review the proceedings of the state courts, as we have had frequent occasion to declare, is not that of a general reviewing court in error but is limited to the specific instances of denials of Federal rights, whether those pertaining to the constitutionality of Federal or state statutes, or to certain rights, immunities, and privileges of Federal origin, specially set up in the state court, and denied by the rulings and judgment of that court."

In *Missouri ex rel.* v. *Public Service Com.*, 273 U. S. 126, 71 L. Ed. 575, on error to the Supreme Court of Missouri to review a judgment reversing the Circuit Court of Cole County, after the entry of the judgment below a statute of Missouri was enacted fixing a greater clearance for the location of a railroad track beneath the street than was involved in the litigation in the State court. This Court, after stating that:

> "Ordinarily this court on writ of error to a state court considers only federal questions and does not review questions of state law."

further held that though its appellate powers were not thus restricted when questions of State law arising after the decision below are presented in this Court, yet:

> "The meaning and effect of the state statute now in question are primarily for the determination of the state court. While this court may decide these questions, it is not obliged to do so, and in view of its nature, we deem it appropriate to refer the determina-

tion to the state court. Dorchy *v.* Kansas, supra, 290, 291 (68 L. Ed. 689, 690, 44 Sup. Ct. Rep. 323). In order that the state court may be free to consider the question and make proper disposition of it, the judgment below should be set aside, • • •"

In *U. S.* v. *Pink*, 315 U. S. 203, 86 L. Ed. 796, 62 S. Ct. Rep. 552, this Court, through Mr. Justice Douglas, held that:

"• • • we are not free to inquire as petitioner suggests, into the propriety under New York practice of grounding the motion for summary judgment on the record in the Moscow Case. *That is distinctly a question of State law on which New York has the last word.*" (Emphasis added.)

VI

The records show that "most if not all" of the questions referred to by the Missouri Supreme Court on page 592 of its opinion in 193 S. W. (2d) 588, and also many other questions raised by appellants on this appeal, have been decided adversely to appellants by courts of competent jurisdiction in suits brought by appellants or in which they actively participated, and that appellants have not only had their day in court but their months and years.

In several places in appellants' Jurisdictional Statement, they seemingly criticize the opinion of the Supreme Court in 193 S. W. (2d) 588, on account of the following recital appearing therein:

"They (the appellants) have not only had their day in court, but their months and years."

This statement follows the following recital therein (p. 592):

"Appellants make many other assignments of error; assailing the constitutionally of Missouri statutes

relating to partnership estates, and the probate laws of both Missouri and Kansas; ask us to declare void certain decisions of the Supreme Court of Kansas; invoke the treaty between this country and France in 1803 and the 'due process' and other provisions of the State and Federal Constitutions. Most if not all these questions have been decided adversely to appellants by courts of competent jurisdiction in suits brought by appellants or in which they actively participated as defendants. Moffett *v.* Moffett, 131 Kan. 582, 292 Pac. 947, 77 A. L. R. 294; Clark *v.* Andrews, 136 Kan. 23, 12 P. 2d 294; Clark *v.* Moffett, 136 Kan. 711, 18 P. 2d 555; Id. 290 U. S. 602, 54 S. Ct. 227, 78 L. Ed. 528; Moffett *v.* Robbins, D. C., 14 F. Supp. 602; Moffett *v.* Robbins, 10 Cir., 81 F. 2d. 431, Id. 298 U. S. 675, 56 S. Ct. 940, 80 L. Ed. 1397. Appellants have not been denied due process. They have not only had their day in court, but their months and years."

In the immediately following, and concluding paragraph, in referring to the above mentioned assignments of error, the Supreme Court said (p. 592):

> "None of these assignments is germane to the question of whether the fifth amended petition contains a misjoinder of parties plaintiffs or fails to state a joint cause of action. We hold that the judgment is correct in form and in accordance with law and it is therefore affirmed."

It is thus evident that the Missouri Supreme Court deemed these assignments as having no significance in the light of the actual issues involved before it, and that the only constitutional question attempted to be passed upon, or which was passed upon by the court, was the contention that Section 948 violated the provisions of Section 10 of Article I of the Constitution of the United States relating to bills of attainder. As will elsewhere appear herein, the

Missouri Supreme Court properly held that this contention was unsubstantial and frivolous.

The opinions in *Moffett* v. *Clark*, 131 Kan. 582 (rendered November 8, 1930), *Clark* v. *Moffett*, 136 Kan. 711 (rendered January 28, 1933), and *Clark* v. *Andrews*, 136 Kan. 923, are all expressly referred to in the Fifth Amended Petition, and by reason of the pleading thereof, under the provisions of Section 958, R. S. Mo. 1939, reading as follows:

> "Sec. 958.—In every action or proceeding wherein the law of another state of the United States of America is pleaded, the courts of this state shall take judicial notice of the public statutes and judicial decisions of said state. R. S. 1929, Sec. 806."

the Missouri Supreme Court took judicial notice of these opinions, as well as of the laws, statutes and decisions of the State of Kansas. The record (*507-514) (*521-535) in the *Howard* fee case (345 Mo. 741, 137 S. W. 2d 507) shows that the opinions in *Moffett* v. *Robbins*, 14 Fed. Supp. 602, and *Moffett* v. *Robbins*, 81 F. (2d) 431, were offered in evidence therein, and under the following pronouncements in the case of *Knorp* v. *Thompson*, 352 Mo. 44, l. c. 52, 175 S. W. (2d) 889, l. c. 894:

> "Of course, a court can judicially notice its own records, and courts, when justice requires, should and do, in deciding a case, consider the records of other cases, as '* * * where the interests of the public in ascertaining the truth are of paramount importance, as also in cases where the court is seeking to determine what is a reasonable exercise of its discretion, or whether the present proceeding is merely a moot one. And 'there may be cases so closely interwoven, or so clearly interdependent as to invoke' a rule of judicial notice in one suit of the proceedings in another suit.' "

the Supreme Court of Missouri was entitled to take judicial notice of these two opinions.

The records of this Court will show that on or about June 23, 1933, Grace Torrance Clark as the Kansas Administratrix of the Thomas S. Moffett Estate, and Louise McGrew Moffett as sole beneficiary of Thomas S. Moffett, filed in this Court, petition for writ of certiorari to review the case of *Clark* v. *Moffett,* 136 Kan. 711; that said petition was docketed therein as cause No. 181, and that this Court on October 9, 1933, denied certiorari therein (290 U. S. 642, 78 L. Ed. 558), and on December 11, 1933, this Court denied petitioners leave to file petition for rehearing (290 U. S. 602, 78 L. Ed. 528).

The records of this Court will show that on or about April 11, 1936, Louise McGrew Moffett, as Executrix of the Estate of Thomas S. Moffett, deceased, and Louise McGrew Moffett, individually, filed in this Court, petition for writ of certiorari to review the case of *Moffett* v. *Robbins,* 81 F. (2d) 431; that said petition was docketed therein as cause No. 918, and that this petition was denied on May 18, 1936 (298 U. S. 675, 80 L. Ed. 1379).

We have compiled and are placing in the Appendix hereto, pages 152-157 inclusive, the respective Specifications of Error set forth in these petitions, respectively.

The Specifications of Error will clearly disclose that most, if not all of the questions attempted to be raised in the instant case were previously raised in the Supreme Court of Kansas, and in the Tenth Circuit Court of Appeals, and were brought to the express attention of the United States Supreme Court in Petitions for certiorari. Reference will be further made to these Specifications in other parts of this

Statement

The records of this Court in said cause No. 181 will also show the following at the respective pages of the record in said cause set opposite thereto:

1. Findings of fact and conclusions of law in the Harper County District Court, pages 531 (484) to 572 (525), which findings included Commerce Trust Company's Exhibit No. 8, which is referred to in Finding No. 27, page 545 (498), as provided in the following recital in Finding No. 27:

> "A true copy of said report is attached hereto as a part of the findings of the Court."

Said Exhibit No. 8 attached thereto appears in full on pages 572 (525) to 594 (548).

2. Plaintiffs' motion to change, modify, strike out, and make additional findings of fact and conclusions of law, pages 595 (549) to 616 (570).

3. Journal entry of the Harper County District Court, pages 624 (578) to 629 (583).

Journal entry of judgment of the Harper County District Court, pages 629 (583) to 660 (614).

4. Finding of fact No. 24 appears beginning at 543 (496).

5. Plaintiffs' requested finding No. 13 appears pages 601-603 (555-557).

6. Stipulation concerning accounting, pages 160-161 (126-127).

In giving the above citations to the record, the first figures mentioned are the numbering given to the record by the Clerk of the Supreme Court of the United States, and the figures second appearing are the pages of the record in the transcript filed in the Supreme Court of Kansas.

Under its decisions hereinafter referred to, the United States Supreme Court will take judicial notice of its records in connection with these certiorari proceedings.

We particularly refer to the court's findings of fact and conclusions of law, and the findings of fact and conclusions of law requested by the then plaintiffs, now appellants, in the Harper County, Kansas, District Court proceedings, and the judgment entry of that court, appearing respectively on the above pages in the Abstract of the Record filed in this Court in the aforesaid case No. 181. In other parts of this Statement we will comment concerning some of the recitals therein.

For the convenience of the Court, we are setting forth in an Appendix attached hereto, on pages 110-119, inclusive thereof, the opinion of the Supreme Court in the case of *Moffett* v. *Moffett*, 131 Kan. 582, and on pages 119-133 thereof, the opinion of the same Court in the case of *Clark* v. *Moffett*, 136 Kan. 711, and on pages 134-146 thereof, inclusive, the opinon in the case of *Moffett* v. *Robbins*, 81 F. (2d) 431. Under its decisions hereinafter referred to, the United States Supreme Court will take judicial notice of its records in connection with these certiorari proceedings.

The Supreme Court of Missouri would likewise have been entitled to take judicial notice of the case of *Moffett* v. *Moffett*, 131 Kan. 546, 292 Pac. 942, mentioned and set forth above in *Clark* v. *Moffett*, 136 Kan. 711, on account of the following recital therein (l. c. 713):

> "The will of John Moffett had been construed as it affected some of the beneficiaries, both by this court (Moffett *v.* Moffett, 131 Kan. 546, 292 Pac. 942) and by the Supreme Court of Missouri (Zombro *v.* Moffett (Mo.), 44 S. W. 2d 149)."

The Supreme Court of the United States would likewise be entitled to take judicial notice of the case of *Moffett* v. *Moffett*, 131 Kan. 546, because its records show that on or about February 2, 1931, Louise McGrew Moffett and Grace Torrance Clark, Administratrix, filed in this Court petition for writ of certiorari to review the decision of the Supreme Court of Kansas in the last named case; that said cause was docketed therein as cause No. 700, and that therein the petitioners asserted that the judgment denied Thomas S. Moffett the equal protection of the laws of the State of Kansas, in violation of Section 1 of the Fourteenth Amendment to the Constitution of the United States, and that by such decision, T. S. Moffett was deprived of the full enjoyment and possession of property "in violation of the command of Section 1 of the Fourteenth Amendment to the Constitution of the United States."

The petition in this case contains the following recital:

> "T. S. Moffett, one of the parties against whom the suit was instituted in the District Court of Comanche County, Kansas, and who was the appellant in the Supreme Court of the State of Kansas in the case sought to be reviewed herein, died on December 22, 1930, after judgment and after his motion for a rehearing was filed and denied.
>
> "Thereafter, said cause was duly revived in the names of your petitioners in the Supreme Court of the State of Kansas, to-wit Louise McGrew Moffett, widow and sole beneficiary under the will of T. S. Moffett, and Grace Torrance Clark, administratrix with the will annexed in Kansas of the estate of T. S. Moffett, by substituting them as appellants, in lieu of the said T. S. Moffett, during the judgment term."

The records of this Court show that this Court, on March 9, 1931, denied certiorari (283 U. S. 825, 827, 75 L. Ed. 1440).

Elsewhere in this Statement further reference will be made to the issues in the District Court and in the Kansas

Supreme Court and in the United States Supreme Court in said case, and reference will also be made to the application thereof to certain allegations in the Fifth Amended Petition.

In another section of this Statement, reference will be made to the questions raised by appellants in these three certiorari proceedings, and therefrom it will, we think, expressly appear that before this Court appellants raised many of the identical questions now raised by them in their Jurisdictional Statement, and it will, we think, appear therefrom that "most if not all" of the questions now raised were raised by them, and decided adversely to them, and it is to be presumed that appellants raised in the certiorari proceedings, all questions which they deemed of any significance.

The limitation upon our time will prevent a thorough review of what appears in the above mentioned opinions of the Supreme Court of Kansas and in the above mentioned cases of *Moffett* v. *Robbins,* 14 Fed. Supp. 602, and 81 F. (2d) 431. However, in view of appellants' present contention, we invite consideration of all these cases, and particularly the case of *Moffett* v. *Robbins,* 81 F. (2d) 431, because therein Judge Bratton reviewed a petition of the same appellants, prepared by the same lawyers, raising many of the questions which are now attempted to be raised by appellants' attorneys. This case involved a proceeding instituted by Louise McGrew Moffett individually and as Executrix of the Estate of Thomas S. Moffett, deceased, against R. O. Robbins, Ancillary Administrator in Kansas With the Will Annexed of the Estate of John Moffett, Deceased (charging conspiracy between Helen Moffett, said R. O. Robbins, Commerce Trust Company, and others, the alleged nature of which is set forth in said opinion (l. c. 434), to enjoin the enforcement of the judgment

rendered by the District Court of Harper County, Kansas, which was affirmed by the Supreme Court of Kansas in 136 Kan. 711. This opinion is particularly important because it sets forth in great detail, contentions therein raised by the appellants and disposes of all of the same with unusual directness and clarity. The Court disposed of, adversely to appellants, many of the contentions now raised by appellants. We shall later refer to some of the recitals therein, but in view of the present contention of the appellants that there was no adversary trial in the Harper County suit, we now reproduce what Judge Bratton said reference to that contention made in the bill filed by the present appellants in the District Court of Kansas, as follows (*Moffett* v. *Robbins,* 81 F. (2d) 431, l. c. 437):

> "(13) The judgment is assailed on the further ground that there was no adversary trial. Louise McGrew Moffett, as sole beneficiary of the estate of Thomas S. Moffett, Grace Torrance Clark as administratrix with the will annexed of that estate and administering the estate of Moffett Bros. in Kansas, and all others having any interest in the estate of the partnership, were parties to the action. The purpose of the proceeding was an accounting and partition; the issues were formed and the crux of the litigation concerned itself very largely with the asserted claim that the partnership was indebted to the estate of John Moffett. Louise McGrew Moffett and Grace Torrance Clark together waged vigorous but unsuccessful opposition to that claim. Counsel who represented them were paid $3,900 from the partnership funds as compensation for their service. Grace Torrance Clark made such payment. The trial consumed several days; all questions were seemingly considered thoroughly; extended findings of facts and conclusions of law were made dealing with every feature of the complicated situation; and an exhaustive judgment was entered. In these circumstances, the mere allegation that there

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was no adversary trial is a conclusion which the record affirmatively disproves."

In addition to the foregoing cases, we are bringing to the attention of the United States Supreme Court, the following from the opinion in the case of *Clark* v. *Moffett,* 136 Kan. 711, l. c. 713:

> "The action came to this court on the pleadings (*Moffett* vs. *Moffett,* 131 Kan. 582 292 Pac. 947), where it was determined that the accounting prayed for was proper.
>
> "When the action went back to the trial court, broadly speaking, the only controversy between the parties was with respect to the accounting. The will of John Moffett had been construed as it affected some of the beneficiaries, both by this court (*Moffett* vs. *Moffett,* 131 Kan. 546, 292 Pac. 942) and by the supreme court of Missouri (*Zombro* v. *Moffett,* (Mo.) 44 S. W. 2d 149). There was no longer any controversy among the parties as to the share or interest which each of them should receive in the land to be partitioned except as the same might be modified by the accounting.
>
> "Broadly speaking, there were but three things to be determined in the accounting. First, were Moffett Brothers indebted to John Moffett individually at the time of his death, and if so, in what sum? Second, was Thomas S. Moffett indebted to the partnership of Moffett Brothers, and if so, in what sum? and third, was the Moffett Brothers Cattle, Land and Lumber Company indebted to Moffett Brothers, and if so, in what sum?

In view of the many unwarranted questions now raised by appellants, we think it not amiss to further quote from *Clark* vs. *Moffett,* 136 Kan. 711, l.c. 714, as follows:

> "This controversy, so comparatively simple in its broader aspects, as above outlined, has been complicated by the manner in which the litigation has been conducted by injecting into it a number of questions

relating to practice or procedure and technical questions, many of which have little or no substantial merit, with the result that the parties have presented to this court for its analysis and its consideration 1740 pages of printed abstracts and briefs."

That the appellants in that case did raise therein many of the questions now sought to be raised in the instant proceeding, is readily apparent by the following statements appearing in *Clark* v. *Moffett*, 136 Kan. 711, l. c. 720:

"Appellants contend that the Commerce Trust Company is without capacity to represent the Moffett Brothers partnership in this action. When the case was in this court before, one of the points determined was that it was proper for the trial court to permit the Commerce Trust Company to intervene in this action in its capacity as administrator of the partnership estate of Moffett Brothers. Ignoring the former determination of this question, appellants present two reasons in support of their contention. First, that the appointment was made by one who assumed to act as special judge, or judge pro tem., of the probate court of Jackson County, Missouri, who was not so chosen in accordance with the constitution and statutes of Missouri, therefore his order making the appointment is void. The trial court found that his selection was made on accordance with the constitution and statutes of Missouri, as interpreted by the supreme court of that state. The finding appears to be sound. But, passing that, he was there acting as judge of the probate court and did make the appointment. No appeal has been taken from that order. The Commerce Trust Company has been acting under the appointment since December 28, 1928. He was at least a judge de facto. The regularity of his appointment, or his acts as judge, cannot be collaterally attacked in this proceeding. (Briggs *v.* Voss, 73 Kan. 418, 85 Pac. 571; Keys *v.* Keys, 83 Kan. 92, 109 Pac. 985.) Second, it is argued that even if the appointment of the Commerce

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Trust Company in that capacity was made, it was for Missouri only and did not authorize it to appear in Kansas. Our statute (R. S. 22-1308) authorizes an administrator of another state to sue or be sued in this state."

In that case the Supreme Court of Kansas (l. c. 723) also passed on the contention of the then plaintiffs, now appellants, that they did not have a fair trial therein, by the use of the following language:

"Finally it is contended plaintiffs did not have a fair trial, and that this is indicated by rulings and remarks of the court as the trial progressed. We have carefully examined the record and all counsel have said on this point and find the contention to be devoid of merit."

Appellants now contend that there was no adversary trial in this case. In view of this contention, what is said by the Kansas Supreme Court in *Clark* v. *Moffett*, 136 Kan. l. c. 724, we think clearly disproves and refutes this contention:

"The third item is the one around which the battle of the trial raged. Much feeling was displayed. What caused this, or who is to blame for it, we shall not pause to consider, if, indeed, the record discloses. Perhaps because of it many contentions were made which were not well founded. Some tactics were indulged in, the obvious purposes of which were to impede rather than to aid the orderly administration of justice. With this attitude prevalent it is fortunate that the trial was before an able and experienced trial judge who could winnow the wheat from the chaff. While doing so the court gave the parties ample time for trial and a fair opportunity in the introduction of evidence. The judgment is fully sustained by the evidence, and, as we view it, in its main features, at least, is the only one which properly could have been reached from the evidence."

The Supreme Court of the United States will also take judicial notice of the following recital in *Clark* vs. *Moffett*, 136 Kan. 711, l. c. 721, 722:

> "Thereafter Louise McGrew Moffett filed a petition for removal to the federal court of what was alleged to be a separable controversy between herself and the defendants Renwick J. Moffett and Joseph W. Moffett with respect to the indebtedness of the estate of Moffett Brothers to the estate of John Moffett, and alleging diverse citizenship. When this was presented to the trial court it refused to order a removal of the cause. A transcript of the proceedings was duly filed in the United States district court. That court, after a hearing, ordered it to be remanded to the state court. There was, of course, no separable controversy between Louise McGrew Moffett on the one hand and Renwick J. Moffett and Joseph W. Moffett on the other with respect to the indebtedness of Moffett Brothers to the estate of John Moffett."

The court will also take judicial notice that the Supreme Court of Kansas reviewed, considered and passed upon the contention that there had been no revivor of the Harper County judgment, and expressly ruled that the cause was properly revived (l. c. 721).

Under its decisions, had it been necessary to do so, the Missouri Supreme Court would have been entitled to take judicial notice of its opinion in the case of *Zombro v. Moffett*, 44 S. W. (2d) 149, above referred to.

It is also interesting to note that in 193 S. W. (2d), 588, which contains Judge Clark's opinion in the instant case, the West Publishing Company in publishing same, places immediately following the syllabi, the following recital: "See, also, 237 M. A. 375, 162 S. W. (2d) 591."

We assume that this was done because of the following language appearing on page 591 of Judge Clark's opinion:

> "The withdrawal of paragraph 45, which related to a suit brought by respondent Kopp against Mrs.

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> Moffett, in no way affected the point made in the demurrers as to misjoinder of parties plaintiff or failure to state a cause of action."

The case mentioned by West Publishing Company is the identical case about which complaint was made in withdrawn paragraph 45.

In the light of the foregoing, it seems to us that there is no possible justification for the contentions made by appellants that Judge Clark in his opinion erroneously stated that "They have not only had their day in court, but their months and years."

Appellees Helen Weede and Commerce Trust Company, as respondents in the instant case in the Missouri Supreme Court filed therein for the convenience of the Court:

> "Extracts from Appellants' Abstract of the Record in Cause No. 36089 in the Supreme Court of Missouri, entitled 'In re Moffett Brothers Partnership Estate,' known as the Howard Fee Case (the opinion in which is reported in 345 Mo. 741, 137 S. W. 2nd, 907), prepared and furnished by respondents, Helen Weede and Commerce Trust Company"

explaining the reasons therefor by the following recital appearing on the cover page thereof:

> "(This photographic reproduction of said extracts is furnished because said Respondents have been informed that the files of the Court contain only one copy of Appellants' Abstract of the Record in said last named cause; and this compilation is furnished solely for the convenience of the Court.)"

and further explaining by the following recital appearing thereon:

> "This compilation contains the following pages of said appellants' Abstract of the Record, reproduced in page sequence: 116 to 254; 337 to 363; 701 to 733; 755; 756; 879 to 881; 998 to 1026; 1071 to 1086; 1095 to 1098; 1132 to 1135; 1142; 1146; 1147; 1150; 1152.

The Exhibits bound in the original Abstract between pages 224 and 225, appear in this compilation between pages 225 and 226."

This was done because the Supreme Court of Missouri was entitled to take judicial notice of the record in the *Howard Fee* case (345 Mo. 741), above referred to, which was a companion case, and expressly brought to the attention of the Missouri Supreme Court by appellants in numerous places in their Fifth Amended Petition, and directly raised again on appeal, and by their Jurisdictional Statement the action of the Supreme Court therein concerning same is now made the basis of further alleged grounds of complaint.

These abstracts from the record contain, on the following pages, the following, all of which were offered and received in evidence in the *Howard Fee* case:

1. Petition for an Accounting and Partition, filed by Thomas S. Moffett in the Harper County District Court (*113 to *122, both inclusive).

2. Amended Seperate Reply of Grace Torrance Clark (*701 to *731, both inclusive).

3. Amended Separate Reply of Louise McGrew Moffett (*731 to *733, both inclusive).

4. Stipulation in the Harper County suit signed by all of the parties plaintiff and defendant (*755, *756).

5. Journal Entry of Judgment in said cause, including Findings of Fact and Conclusions of Law (and also including Exhibit 8) (*116 to *253, both inclusive).

6. Motion to Change, Modify, Strike Out and Make Additional Findings of Fact and Conclusions of Law, filed by plaintiffs on January 12, 1932 (*337 to *361, both inclusive).

We are also reproducing in the Appendix, on pages 146-151 inclusive, the opinion of Judge Hopkins of the United

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States District Court of Kansas in the case of *Moffett* v. *Robbins*, 14 Fed. Supp. 602.

Paragraph 25 of the Fifth Amended Petition (236 to 240), among other things, refers to the partnership estates of Andrews, Lewis and Moffett, in which Thomas S. Moffett had a one-third interest, and of Moffett Brothers and Andrews, in which said Thomas S. Moffett had a one-third interest. Thomas S. Moffett, after the death of John Moffett, took over the administration of these two partnership estates in Kansas with the consent of said Andrews, the then remaining partner. Shortly after the death of Thomas S. Moffett, Grace Torrance Clark secured an order in the Probate Court of Wyandotte County directing her to take possession of these two partnership estates and filed bond. Shortly thereafter, said Andrews filed a motion in the Probate Court of Wyandotte County, in which he asked leave to have the Court modify its order appointing Mrs. Clark. On the 30th day of March, 1931, the Court entered its order modifying its order so appointing her. The effect of this order was to withdraw from Mrs. Clark the right to administer these two partnership estates. The order was appealed to the District Court of Wyandotte County, which reversed the decision of the Probate Court. The case of *Clark* v. *Andrews*, 136 Kan. 23, 13 Pac. (2d) 294, contains the opinion on the appeal from the District Court of Wyandotte County. The Supreme Court in that case reversed the judgment of the District Court, with directions to sustain the order of the Probate Court from which the appeal to the District Court was taken.

These last named facts are taken from recitals appearing in the opinion in the case of *Clark* v. *Andrews, supra*, as well as from recitals in said Paragraph 25.

In Paragraph 25 of the Fifth Amended Petition, appellants seek to challenge the correctness of the above

mentioned opinion of the Supreme Court. As we construe paragraph 25, they also seek to recover damages on account of the appointment of said Andrews.

We shall not lengthen this Statement by reviewing the case of *Clark* v. *Andrews*, which covers almost eight pages, but shall content ourselves with reproducing the syllabi of the court in the opinion filed on July 9, 1932, which, as this Court knows, has peculiar significance under the constitution and laws of the State of Kansas:

> "1. A probate court has authority at a subsequent term to which a matter has been continued to enter an order modifying its original order entered at the prior term appointing an administrator of partnership estates.
>
> "2. Where a partnership composed of three persons is dissolved by the death of one, and administration of the partnership estate is commenced by one of the survivors with the consent of his cosurvivor and the administering partner dies before such administration is completed, the remaining partner upon complying with the provisions of R. S. 22-405 is entitled to administer upon the partnership assets as against the administratrix of the administering partner.
>
> "3. The provisions of R. S. 22-328 that letters testamentary and of administration shall in no case be granted to a nonresident of this state will not be applied to defeat the right of a nonresident surviving partner to administer upon the assets of the partnership."

It thus appears from this opinion that the Supreme Court of Kansas, which is the court of last resort in the State of Kansas, expressly decided against all these contentions of appellants.

Reference to this matter is incorporated herein because the case of *Clark* v. *Andrews* is one of the cases mentioned on page 592 of the opinion of the Supreme Court of

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Missouri in the instant case, as being one where the matters of complaint were decided against appellants by a court of competent jurisdiction.

In many places in the Fifth Amended Petition, appellants make purported quotations from *Moffett* v. *Moffett*, 131 Kansas 582, *Clark* v. *Moffett*, 136 Kan. 711, and many other Kansas decisions. Examination of the Fifth Amended Petition will show in many instances the inclusion of asterisks in these quotations. We have reviewed all of these quoted excerpts in the light of the omission of recitals indicated by asterisks, and respectfully submit that in many instances these omissions and elisions result in false and erroneous application of the quoted excerpts, and the wresting and stripping of certain parts from their context.

The stipulation for accounting hereinbefore referred to on pages 56 and 66 of this part of this Statement, appears in full in the Abstract of the Record in the *Howard Fee* case, on pages (*755, *756) and is in words and figures as follows (omitting the signatures of parties other than the plaintiffs):

> "In the District Court of Harper County, Kansas Grace Torrance Clark, Administratrix etc., et al. Plaintiffs *v.* Helen Moffett, et al. Defendants and Commerce Trust Company, Executor etc., and R. O. Robbins, Administrator with the will annexed of John Moffett, deceased, Intervenors No. 7374.
>
> STIPULATION
>
> "We, the undersigned, being all of the parties, plaintiff, defendant and intervenors in the above entitled cause hereby stipulate and agree that said cause may be set down for a hearing on Wednesday, October 14th, 1931, before the court at 10:30 o'clock a. m. on said day and further stipulate that in the event an accounting should be ordered by the court herein the said parties hereto hereby agree that further proceedings in said

cause shall go forward without delay, or at such time as the court may order.

GRACE TORRANCE CLARK *Admx.*
LOUISE McGREW MOFFETT

Plffs.

By A. E. WATSON *their Atty.*"

The record in the *Howard Fee* case shows (*117, *118):

"* * * and, thereupon the said defendant Helen Moffett presented her motion for a preliminary judgment for an accounting in this action together with a stipulation on file in words and figures as follows, to-wit:

(Here appear the recitals in the body of the above stipulation.)

"And thereupon the Court after argument and statements of counsel and being fully advised in the premises, does sustain said application and it is then and there by the court ordered, adjudged and decreed that all parties to this cause, plaintiffs, defendants and intervenors be and they are hereby ordered to account as to said Moffett Brothers partnership affairs, business and property; and by virtue of the stipulation as aforesaid the accounting is ordered to go forward without delay and thereupon the court announced the burden of proof to be upon the defendants and the intervenors."

In the light of the foregoing, it seems to us that there is no possible justification for the contentions made by the appellants that the Missouri Supreme Court in its opinion in the instant case, erroneously stated:

"Most if not all of these questions have been decided adversely to appellants by courts of competent jurisdiction in suits brought by appellants or in which they actively participated as defendants,"

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or erroneously stated that:

> "They have not only had their day in court, but their months and years."

VII

Judicial Notice (a) This Court will take judicial notice of its records in former cases companion to and interrelated with the instant case, and growing out of transactions pleaded in the instant case, where this Court has denied certiorari on such former cases. (b) The Supreme Court of Missouri in the instant case was entitled to take judicial notice of its own records in former cases closely interwoven with, companion to and interdependent with the instant case and to take judicial notice of the public statutes and judicial decisions of the State of Kansas pleaded in the instant action. (c) The Circuit Court of Jackson County, Missouri, in the instant case was entitled to take judicial notice of all prior proceedings of said Circuit Court and of any division thereof in the instant case, all of the divisions thereof constituting but a single court. (Appellants' Assignment of Errors, Nos. 1 to 13 both inclusive, 25, 27, 28, 32, 35 and 36.)

(a) Matters of Which this Court Will Take Judicial Notice Herein

It is incumbent upon the appellees to bring to the attention of this court the matters of which they desire judicial notice to be taken. *Shapleigh* v. *Mier*, 299 U. S. 468, 81 L. Ed. 355, 57 S. Ct. 261. We therefore solicit the attention of the court to its records in the following cases as appellants are seeking in the instant case to avoid the effects of the adverse judgments in each thereof:

1. *Helen Moffett, Appellee,* v. *Thomas S. Moffett et al., Appellants,* 131 Kan. 546, certiorari denied by

this court March 9, 1931, 283 U. S. 826, 75 L. Ed. 1440, 51 S. Ct. Rep. 351.

2. *Grace Torrance Clark, et al., Appellants,* v. *Helen Moffett, et al., Appellees,* 136 Kan. 711, 18 Pac. (2d) 555, certiorari denied by this court October 9, 1933, 290 U. S. 642, 78 L. Ed. 558, 54 S. Ct. Rep. 61, Leave to file petition for rehearing denied Dec. 11, 1933, 290 U. S. 602, 78 L. Ed. 528, 54 S. Ct. 227.

3. *Louise McGrew Moffett, individually and as executrix, etc., Appellants,* v. *R. O. Robbins, Admr. etc., Appellees,* 81 F. (2d) 431, affirming 14 Fed. Supp. 602, certiorari denied by this court May 18, 1936, 298 U. S. 675, 80 L. Ed. 1397.

At appropriate places, we have referred to and set out the respective Assignments of Error made in the applications to this court for certorari in each of the above cases, showing the contentions made on this appeal which have been heretofore presented to this court in each of the former cases.

In *U. S.* v. *Pink,* 315 U. S. 203, 86 L. Ed. 796, 62 S. Ct. 552, this court, through Mr. Justice Douglas, held that this court will take such notice of a foreign law as the state court whose judgment is under review could have taken and that where it was contended the complaint and the defense were substantially the same in the instant case as in a former one, where the judgment was affirmed in the United States Supreme Court and the former case was not *res judicata* since respondent was not a party thereto, that the United States Supreme Court would take judicial notice of the record in the former case, including the evidence contained in the record. As to the latter point, the court said; 315 U. S. l. c. 216, 86 L. Ed. l. c. 810, 811:

> "The upshot of the matter is that we now reach the issues in Moscow F. Ins. Co. Case in so far as they are

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embraced in the pleadings in this case. And there is no reason why we cannot take judicial notice of the record in this Court of the Moscow F. Ins. Co. Case. Bienville Water Supply Co. *v.* Mobile, 186 U. S. 212, 217, 46 L. Ed. 1132, 1134, 22 S. Ct. 820; Dimmick *v.* Tompkins, 194 U. S. 540, 548, 48 L. Ed. 1110, 1113, 24 S. Ct. 780; Freshman *v.* Atkins, 269 U. S. 121, 124, 70 L. Ed. 193, 195, 46 S. Ct. 41, 6 Am. Bankr. Rep. (N. S.) 744. • • •

"We do not stop to review all the evidence in the voluminous record of the Moscow F. Ins. Co. Case bearing on the question of the extraterritorial effect of the Russian decrees of nationalization, except to note that the expert testimony tendered by the United States gave great credence to its position."

As to judicial notice of foreign law which the Supreme Court of Missouri could take, and consequently which this court can take under *U. S.* v. *Pink, supra,* Sec. 958 R. S. Mo. 1939, reads:

"In every action or proceeding wherein the law of another state of the United States of America is pleaded, the courts of this state shall take judicial notice of the public statutes and judicial decisions of said state."

The Fifth Amended petition ruled upon in the instant case pleads *Clark* v. *Moffett,* 136 Kan. 711 (164, 230 and elsewhere). It pleads the companion cases of *Clark* v. *Andrews,* 136 Kan. 23 (238, 239), and *Moffett* v. *Moffett,* 131 Kan. 582 (231). It pleads a multitude of statutes and other decisions of the State of Kansas. (166, 167, 179, 180, 186, 187 to 193, 200 to 208, 236, 239, 240, 245, 250, among others.)

The Fifth Amended Petition also pleads by date of rendition and alleged points covered, the decision of the Supreme Court of Missouri in the *Howard Fee* case, 345 Mo. 741, 137 S. W. 2, 507. This is mentioned here as an aside, because it clearly brings the *Howard Fee* case opinion before this court.

In *Corbett* v. *Terminal Railroad Assn.*, 336 Mo. 972, l. c. 980, 82 S. W. 2, 97, the Supreme Court of Missouri held with reference to Sec. 958, R. S. Mo. 1939 that:

> "We readily agree that under our statute the proper pleading of the law of another state requires our courts to take judicial notice not only of the law itself, such as a statute of such state, but also of the judicial decisions of such state interpreting or construing such law or statute. (Ramey *v.* Railroad, 323 Mo. 662, 21 S. W. 2d 873, 877, Menard *v.* Goltra, 328 Mo. 368, 40 S. W. 2d 1053.)"

This Court takes judicial notice of its own records in a pending cause and also of records in cases formerly lodged in that court whether they be companion or interrelated proceedings or those formerly had therein by one of the parties to the pending case in which judicial notice of the record of the former case is taken.

This is true as to the record of denial by the Supreme Court of certiorari at a previous stage in the same case. *Aspen Mfg. & Smelting Co.* v. *Billings*, 150 U. S. 31, 37 L. Ed. 986; and it is also true as to denial of certiorari by the United States Supreme Court in another case growing out of the same general subject matter or controversy. *Friezler* v. *Boatmen's Bank*, 212 U. S. 364, 53 L. Ed. 551, l. c. 556, 557.

Under the former practice, where in a murder case the United States Supreme Court had dismissed a writ of error to the highest court of the State for lack of Federal jurisdiction, on a subsequent appeal from an order of the United States Circuit Court denying *habeas corpus* this court not only took judicial notice of its denial of a writ of error in the murder case but further assumed that in the application for such writ of error no point "on which the jurisdiction might have been sustained was overlooked," 42 L. Ed. l. c. 409.

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In *DeBearn* v. *Safe Deposit & T. Co.*, 233 U. S. 24, 58 L. Ed. 833, an appeal from the U. S. District Court to review a decree sustaining a demurrer to and dismissing a bill, the judgment being that the cause be dismissed for want of Federal jurisdiction, the first syllabus in 58 L. Ed. reads:

> "A direct appeal from a Federal district court to the Supreme Court may not be maintained on the theory that rights under the Federal Constitution were involved, *where the supposed constitutional questions have already been twice decided by the Supreme Court to be so wanting in merit as not to afford ground for the exercise of jurisdiction to review the judgments of a state court of last resort.*" (Emphasis added.)

The above seems very pertinent to the instant case. The opinion by Chief Justice White, holds:

> " 'We take judicial notice of our records, and, if not res judicata, we may, on the principle of stare decisis, rightfully examine and consider the decision in the former case as affecting the consideration of this;' and again, as further declared in Dimmick *v.* Tompkins, 194 U. S. 540, 548, 48 L. Ed. 1110, 1113, 24 Sup. Ct. Rep. 780; 'The court has the right to examine its own records and take judicial notice thereof in regard to proceedings formerly had therein by one of the parties to the proceedings now before it.' Availing of this power and making reference to the records of this court, it appears that the *controversy as to the validity of the attachments with which the appeal before us is concerned has, on three different occasions, been here considered.*" (Emphasis added.)

In *Bienville Water Supply Co.* v. *Mobile*, 186 U. S. 212, 46 L. Ed. 1132, an appeal from the U. S. Circuit Court the following is from the opinion by Mr. Justice Brewer:

> "It appears that the decree in the other suit was rendered in the circuit and affirmed in this court about seven months before the decision of the present case in

the circuit court. As against this, it may be said that the decree in the other suit was neither pleaded nor proved, and no question of res judicata can be considered unless the earlier decision is formally presented on the hearing of the later case. This, doubtless, is technically true, but we take judicial notice of our own records, and, *if not res judicata, we may, on the principle of stare decisis, rightfully examine and consider the decision in the former case as affecting the consideration in this.*" (Emphasis added.)

(b) Judicial Notice by Missouri Supreme Court of Its Own Records in Other Cases

The Missouri Supreme Court will take judicial notice of the record before it in other cases when the public interest in ascertaining the truth is of paramount importance; where the cases are so interwoven or interdependent as to invoke a rule of judicial notice, and this is true even as to taking notice in one division, of the stricken portion of an answer in the record of the former suit in the other division of the court. In *Sabol* v. *St. Louis Cooperage Co. Mo. Div. 2*, 31 S. W. 2, 1041, l. c. 1043, it was held:

"The errors assigned by plaintiff to the subsequent action of the trial court in sustaining defendant's objection to the introduction of evidence must be determined upon the pleadings as they were before that court, after part of defendant's answer had been stricken. It does not follow, however, that we are precluded from considering the opinion of Division 1, because that part of defendant's answer embodying the same was stricken out. That opinion is part of the records of this court, of which we take judicial notice. 23 C. J. 110 #1918; Keaton *v.* Jurndt, 259 Mo. 179, 168 S. W. 734."

And in *Knorp* v. *Thompson*, 352 Mo. 44, l. c. 52, 175 S. W. 2, 889, l. c. 894, it is said:

"Of course a court can judicially notice its own records, and courts, when justice requires, should and do,

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in deciding a case, consider the records of other cases, as '• • • where the interests of the public in ascertaining the truth are of paramount importance, as also in cases where the court is seeking to determine what is a reasonable exercise of its discretion, or whether the present proceeding is merely a moot one. And 'there may be cases so closely interwoven, or so clearly interdependent as to invoke a rule of judicial notice in one suit of the proceedings in another suit.' 23 C. J., pp. 113-114; Thompson *v.* Scott, supra. See also 31 C. J. S., Evidence, sec. 50.' ''

(c) Judicial Notice Taken by Missouri Circuit Courts of Its Records in the Same Case

Judge Ridge, in ruling upon the Fifth Amended Petition, properly took judicial notice of all prior proceedings and rulings by his colleagues sitting in other divisions of the same court.

A circuit court of the State of Missouri must take judicial notice of the state of the record and of all proceedings had before it in the same litigation. *Fears* v. *Riley*, 148 Mo. 49, l. c. 60, 49 S. W. 836.

In *Pelz* v. *Bollinger*, 180 Mo. 252 l. c. 262, the Supreme Court said that the circuit court "was bound to take judicial notice of all proceedings before it in the same litigation."

In *State ex Rel.* v. *Landwehr*, 332 Mo. 622, l. c. 628, 60 S. W., 4, the Supreme Court of Missouri, *en banc*, held:

> "Jurisdiction of circuit courts is fixed by law and not by rules or orders of the court. There is but one circuit court in the City of St. Louis, composed of eighteen parts called divisions. (Goddard to use of Hyde *v.* Delaney, 181 Mo. 564, 80 SW 886; In re Clark, 208 Mo. 121, 106 S. W. 990. There being but one circuit court necessarily there is but one jurisdiction. • • • each division of the court has all the jurisdiction of the court of which it is a part, unless otherwise provided by law."

And in *Case* v. *Smith*, 215 Mo. App. 621, l. c. 628, 257 S. W. 148, l. c. 150, the Kansas City Court of Appeals held:

> "The circuit court of Jackson county is one court, though it has different divisions, which are separate only to the extent that where a case has been assigned to and is pending in one division no other division has jurisdiction thereover, and cannot have, until the case has been duly transferred to such other division."

We appreciate that the denials of certiorari by this court in the cases involved in litigation by the Moffetts cited at the beginning of this point, do not have the conclusive effect of general judgments; but in view of the decision of this court cited under the first subdivision of this point, we submit that if the appellants can maintain the instant litigation, *res judicata* and *stare decisis* ceases to have meaning except for antiquarian research; and that if the law rightly can breathe life into the charred remains of the Moffett litigation to which we have referred, hereafter no one may be

> "called in question of the hope and resurrection of the dead" (Acts. 23:6).

VIII

Appellants' Assignment of Error No. 2 (See Appellants' Jurisdictional Statement, Page 8).

In Assignment No. 2 Appellants claim that the Supreme Court of Missouri, 193 S. W. 2d 588, violated Appellants' constitutional right by failing to give *res adjudicata* effect to its own decision *in re Moffett Brothers Partnership Estate*, 345 Mo. 741, that such refusal to follow its own decisions denied Appellants' their right under the Fourteenth Amendment.

No constitutional question was involved or decided in 345 Mo. 741. Indeed no constitutional question was decided

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by the Missouri Supreme Court in the instant case except the validity of Section 948, R. S. Mo. 1939. The case of *Moffett* v. *Moffett*, 345 Mo. 741, was not necessary to a decision in the instant case. Appellants erroneously contend otherwise and state that the Court held in that case that the Appellants therein could sue jointly there and therefore they could sue jointly here. The case, 345 Mo. 741, originated in the Probate Court of Jackson County, Missouri. Briefly, it was a claim for compensation as attorneys' fees rendered in the Moffett Estates. That was the only issue. The fees were allowed, appeal was had to the Circuit Court of Missouri and affirmed, and appeal was had to the Supreme Court of Missouri. The jurisdiction of the Supreme Court was derivative. There was only one question that was involved or could be involved. The Supreme Court of Missouri could not and did not enlarge its jurisdiction and consider other issues. On page 508 (137 S. W. 2d) the Court said:

> "The record covers nearly 1,400 pages and the briefs cover nearly 700 pages, and many alleged grounds are urged by appellant to support the contention that the judgment should be reversed, but the conclusion we have reached makes it unnecessary to consider but one of these grounds, viz., that under the facts claimant is not entitled to any fee from Moffett Brothers Estate • • • (512) The Judgment should be reversed and the cause remanded with directions to enter a judgment denying claimant any additional fees, but approving the payment of the $1,300.00, and it is so ordered."

In the opinion of Judge Clark in the instant case, 193 S. W. 2d, l. c. 592, the Court said:

> "In Re: Moffett Brothers etc., 345 Mo. 741 • • • grew out of an attorney fee allowed B. C. Howard for representing Commerce Trust Company as Admin-

> istrator of the partnership estate. Mrs. Moffett individually and as Executrix of her husband resisted the allowance in the Probate Court, Circuit Court, and Supreme Court. No point presented or decided as to Mrs. Moffett's right to appear in both capacities. The only point decided was that Howard was not entitled to an additional fee. 345 Mo. l. c. 745; 137 S. W. 2d l. c. 508. Some of the respondents in the instant case were not parties to that suit. Certainly the decision in that case is not res adjudicata as to the sufficiency of the petition in the instant case."

The Supreme Court of Missouri merely interpreted its own opinions which happened to be contrary to the interpretation of Appellants. Not having decided any constitutional question, this Court will not review the opinion of the Missouri Supreme Court. Assignment No. 2 is unsubstantial and has no foundation in fact or law.

In the *Howard Fee* case, 345 Mo. 741, l. c. 746, the court further said:

> "December 22, 1928, the trust company, proceeding under Section 86, Revised Statutes 1929 (Mo. Stat. Ann., sec. 86, p. 52), claims to have become administrator of Moffett Brothers estate in Missouri. It is contended by appellant that the trust company was not legally authorized to administer the Moffett Brothers estate, but, as stated, we shall consider only one question."

Appellants seek to invoke what the Missouri Supreme Court has called "the hitherto unheard of doctrine of judgment by implication." In *Duval* v. *Duval*, 316 Mo. 626, l. c. 635, it, through that distinguished and veteran jurist, Judge Robert F. Walker, spoke thus:

> "To contend in the face of the plain and unmistakable words of this opinion that it was intended to include things not expressed therein, but on the contrary, intentionally omitted therefrom, is to invoke the hitherto unheard of doctrine of judgment by implication."

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Furthermore, Howard's claim for fees originated in the Probate Court and was appealed to the Circuit Court and from thence to the Supreme Court. The jurisdiction of the Circuit and Supreme Courts, respectively, on appeal, being purely derivative, was confined exclusively to such jurisdiction as the Probate Court originally had. It could not be enlarged to any extent or in any particular by reason of the appeals. See *in re: Mills Estate,* 162 S. W. (2d) 807; *State ex Rel. Burns v. Woolfolk* ,303 Mo. 589.

Appellants filed in the Supreme Court of Missouri in the *Howard* fee case, a motion to tax costs therein, and the Court sustained said motion by an order in words and figures as follows:

> "And now the Court having seen and fully considered appellant's motion to tax cost, doth order that said motion be, and the same is hereby sustained in the sum of $979.05, said costs to be taxed against respondent B. C. Howard."

Thereafter, appellant Louise McGrew Moffett, filed in said Court a motion to modify the order, above-mentioned, taxing costs. Commerce Trust Company filed in the Supreme Court of Missouri written suggestions in opposition to the last mentioned motion. It is to be noted that in the aforesaid motion to modify the order taxing costs, the appellants stated:

> "That Commerce Trust Company has in its possession a sum in excess of ten thousand dollars ($10,000) belonging to Moffett Brothers Partnership Estate and that appellant Louise McGrew Moffett expended from her own funds the amount of the costs taxed against respondent B. C. Howard and that in appealing the said cause and defraying the expenses of the appeal said Louise McGrew Moffett was engaged in the performance of a duty which should have been performed by the respondent ,Commerce Trust Company in the

> capacity which it unlawfully assumed, to-wit: Administrator of Moffett Brothers Partnership Estate. See Harrington *v.* Evans, 49 Mo. App. 372. That for said reason the said Louise McGrew Moffett is entitled to be reimbursed by respondent commerce Trust Company individually or in any event out of the partnership assets from funds of that estate to justify her expenditures benefited."

and attempted to justify the taxation of costs against commerce Trust Company in its individual capacity on the above-recited grounds.

On may 7, 1940, said Court entered an order overruling said motion of appellants to modify the order taxing costs.

IX

In Appellants' First Assignment of Error (see also Page 7, Appellants' Jurisdictional Statement) it is claimed that the Supreme Court of Missouri, 193 S. W. 2d 588, denied Appellants their constitutional rights by holding that "the petition did not state a cause of action."

The opinion itself (l. c. 592) shows the contrary. The matter appealed from was the judgment of Judge Ridge, which, broadly speaking, held that there was a misjoinder of parties plaintiff. The opinion of the Missouri Supreme Court, after discussing Appellants' contentions and assignments of error, said (l. c. 592):

> "Appellants make many other assignments of error • • • None of these assignments is germane to the question of whether the Fifth Amended Petition contains a misjoinder of parties plaintiff or fails to state a joint cause of action. We hold the judgment is correct in form and in accordance with law, and it is therefore affirmed."

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In the opinion, 193 S. W. 2d 588, l. c. 591, the Supreme Court expressly stated:

> "The petition fails to state a joint cause of action and it was unnecessary for the trial court and is unnecessary for this court to determine whether a cause of action is stated in favor of Mrs. Moffett in either capacity. Rockwood *v.* Crown Laundry Co., 352 Mo. 561, 178 S. W. 2d 440, loc. cit. 443; Doerr-Engel *v.* Tide Water Oil Co., 342 Mo. 1141, 119 S. W. 2d 402; Neiderberg *v.* Golluber, Mo. Sup., 162 S. W. 2d 592, loc. cit. 599. Judge Ridge sustained the demurrers on the sole ground of misjoinder of parties, but the demurrers also attacked the petition for misjoinder of alleged causes of action and for failure to state a cause of action. We think the reason assigned by the trial court is sufficient."

All of these cases clearly support the pronouncements of the Court.

Other than the validity of Section 948, R. S. Mo. 1939, the Supreme Court of Missouri passed on no constitutional question. This Court will not review the decisions of the Supreme Court of Missouri touching issues upon which that Court did not pass.

We might rest this point here, but, in order to demonstrate the unsoundness of Appellants' Assignment No. 1, may we suggest that the separate demurrers to Appellants' Third Amended Petition and also to their Fifth Amended Petition admitted only the well-pleaded facts therein. They did not admit Appellants conclusions of law and fact. The Appellants' claim that said demurrers admitted that Judge Hay was corrupt is refuted by the petitions themselves and by the specific declaration therein. The Third Amended Petition disclaims that the words "corrupt" or "corruption" were used therein relative to Judge Hay (Appellants' Abstract, 299-300). Appellants' Jurisdic-

tional Statement also disclaims it (Page 43), in which the following improperly appears:

> "Appellees have admitted that the acts of the Kansas State District Judge, which they twice admitted to be true (once in their demurrer to the Third Amended Petition and once in their demurrer to the Fifth Amended Petition), were acts of a corrupt judge (299). Appellants had not used that language."

We feel it fair to this Court and to justice to state there is nothing in the record that justifies the Appellants' charge that Appellees in any manner, in any place, ever admitted that the acts of Judge Hay were corrupt. On the very contrary, this record shows from beginning to end that the exact opposite is true. Both of said Third and Fifth Amended Petitions, touching the charge of fraud and corruption as related to Judge Hay, were nebulous, uncertain, and reached no higher point than innuendoes. Under such charges the demurrers did not admit Plaintiffs' present contention that Judge Hay was corrupt. In order to make a valid charge of fraud or corruption facts must be pleaded from which fraud must necessarily be implied.

In *Weitzman* v. *Weitzman*, 156 S. W. 2d l. c. 908, the Supreme Court of Missouri said:

> "Considering as true the ultimate facts pleaded, we find them insufficient to state a cause of action in fraud. *To state a good cause of action in fraud sufficient facts must be pleaded from which fraud must necessarily be implied.*
>
> "The ultimate facts pleaded and not the conclusions of the pleader control. The rule is well stated in 27 C. J. 31, Sec. 147:
>
> "'A declaration or other pleading setting up fraud as a basis of recovery of damages must clearly and distinctly allege all of the essential elements of action-

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able fraud * * * A characterization of acts as fraudulent which are not fraudulent per se is not sufficient. It must be made to appear by the facts alleged, independent of mere conclusions, that if the allegations are true a fraud has been committed.' * * *

"Fraud is never presumed, but must be proved by clear and convincing evidence, and he who charges fraud has the burden of so proving it."

In the case of *Sabin* v. *Home Owners Loan Corporation*, 151 F. (2d) 541, the United States Circuit Court of Appeals for the Tenth Circuit, in affirming a summary judgment for the defendants, said, l. c. 542:

"Flimsy or transparent charges or allegations are insufficient to state a justiciable controversy requiring the submission thereof for trial. * * * The statement that the trial court was overreached is a mere conclusion and not a statement of fact. This assignment of error does not merit any serious consideration or extended discussion. It is sufficient to say that the manner in which the foreclosure action was tried by the trial judge was the issue in the appeal to the Oklahoma Supreme Court. All the questions now urged as to the admission of evidence or other rulings of the trial court were urged then. The Supreme Court found no error in the manner in which the trial was conducted, and found that it had been in all respects in conformity with the law of the State."

This case parallels the instant case. An application for writ of certiorari was denied by this Court on May 7th, 1946, being Cause No. 952.

In *Kithcart* v. *Ins. Co.*, 88 F. (2d) l. c. 410, Judge Gardner, speaking for the Eighth Circuit, said:

"On motion to dismiss, all well-pleaded facts, but not conclusions, are admitted.

"It may be gathered from the allegations of the bill that it was the claim of plaintiff that through the

fraudulent acts of defendant, he was prevented from producing certain testimony * * * Just what evidence plaintiff was prevented from producing is not made clear. Neither is it clear what acts were committed * * * which it is claimed constituted fraud * * * It is elementary that a bill of complaint charging fraud must set out with some degree of particularity the material facts claimed to constitute the fraud (citing authorities)."

The Court will note that Appellants' Third Amended Petition consisted of 73 pages and was filed September 21st, 1943 (Appellants' Abstract, 62-135); that Appellants' Fifth Amended Petition, consisting of 200 pages (Appellants' Abstract, 154-354) was filed November 1st, 1944, several years after all of the Moffett litigation had been decided adversely to them in the various jurisdictions. For instance, *Moffett etc.* v. *Moffett etc.*, 131 Kans. 582 affirmed the judgment of Judge Hay November 8th, 1930; *Clark etc.* v. *Moffett etc.*, 136 Kans. 711, affirmed Judge Hay on January 28th, 1933; and thereafter certiorari was denied by this Court, 290 U. S. 602, 290 U. S. 642. The United States District Court for the State of Kansas in *Moffett etc.* v. *Robbins etc.*, 14 Fed Sup. 602, sustained Judge Hay on September 4th, 1935. The United States Circuit Court of Appeals in *Moffett etc.* v. *Robbins etc.*, 81 F. (2d) 421, sustained Judge Hay January 15th, 1936, and thereafter this Court denied writ of certiorari, 298 U. S. 675.

Your Honors will note that Appellants' Assignment No. 1 is an effort to undo all of this litigation on the baseless charge that the demurrer to the Third Amended Petition filed in 1943 admitted that Judge Hay was corrupt concerning a petition that shows on its face that such charge of "corruption" was not made, but, on the contrary, denied.

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If Appellants plead that a demurrer admits the corruption of a trial judge and the same pleading denies that corruption was charged, then there is a conflict, which, of course, precludes the claim that the demurrer admits such a charge. In *State ex rel.* v. *Horner*, 187 S. W. 2d 976 (Mo. App.) Syllabus 3 reflects the opinion of the Court, and is as follows:

> "Conflicting allegations are not admitted by a demurrer."

We are endeavoring to save time and space but beg to add one more case. In *Amber* v. *Choteau*, 107 U. S. 586, 591, the Court held that the words "fraud" and "conspiracy" alone, no matter how often repeated in a pleading, can not make a case for the interference of a court of equity. They have no more effect than other words of the same unpleasant signification. This principle was well *stated in Losch* v. *Pickett*, 36 Kans. l. c. 222, where it was said:

> "A plaintiff should in all cases be bound by his allegations deliberately made • • • A party to an action should not be allowed to obtain benefits from contradictory and inconsistent allegations deliberately made in his pleadings • • • The spirit of our civil code is that a party shall state in his pleadings the real facts of his case and not falsehoods or fictions • • • A thing can not be true and untrue at the same time, and any pleading containing allegations made by the same party both affirming and denying a particular thing carries falsehood on its face."

This Court will note that the demurrer complained of was lodged against the Third Amended Petition and not against the Fifth Amended Petition (the instant petition) consisting of 200 pages and filed more than a year later.

We think that it is our duty while we are on the point of the integrity of Judge Hay, which is being assaulted,

that we give you the appraisal of the Supreme Court of Kansas. In *Moffett etc.* v. *Moffett etc.*, 136 Kans. l. c. 724, the Supreme Court of Kansas said:

> "Perhaps because of it many contentions were made which were not well founded. Some tactics were indulged in, the obvious purpose of which was to impede, rather than to aid, the orderly administration of justice. With this attitude prevalent, it is fortunate that the trial was before an able and experienced trial judge who could winnow the wheat from the chaff. While doing so, the court gave the parties ample time for trial and a fair opportunity in the introduction of evidence. The judgment is fully sustained by the evidence, and, as we view it, in its main features, at least, is the only one which properly could have been reached from the evidence."

All of the allegations of forgery, criminal conspiracy, fraud, etc., charged against the Appellees may properly be reduced to a single point, to-wit: Exhibit 8 in the Harper County partition-accounting suit tried by Judge Hay. That Exhibit was an exposition of the condition of the Moffett books, which was the basis of the litigation. When Your Honors examine the Abstract of the Record in your Court in *Clark etc.* v. *Moffett etc.*, 136 Kans. 711, 290 U. S. 642, 290 U. S. 602, Cause No. 181 in your Court, you will find Appellants' Request No. 13 for Judge Hay to modify a finding of fact (Appellants' Abstract, 24), which request shows that they asked Judge Hay to find that the Moffett Brothers books, of which they now so bitterly complain, were considered by all parties as reasonably reliable and dependable and were accepted by all parties as correct. Their Request is as follows:

> "The partnership books as set up on January 1, 1924, continuously remained in the possession of John Moffett and Thomas S. Moffett, partners, until the

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date of the death of said John Moffett, and that after the death of John Moffett, Thomas S. Moffett had possession of all the books, papers and documents belonging to the partnership of Moffett Brothers until the date of his death, at which time the possession of said books and documents passed to the possession of Louise McGrew Moffett (as Executrix of the Estate of Thomas S. Moffett, Deceased) who has since continuously kept possession of all the books, papers and documents belonging to the partnership of Moffett Brothers and the said Louise McGrew Moffett (as such Executrix is now in the possession of the same • • • These books (excepting the books known as the ledger and journal of Moffett Brothers and Andrews) while they may not have been artfully and scientifically kept were in the main substantially correct and up to the time of the death of John Moffett they were regarded by all the parties whose accounts were kept therein as reasonably reliable and dependable. After the accountants set up the new books their report was fully considered by both partners, John Moffett and Thomas S. Moffett, and it does not appear that either one of them ever made any objections or complaints in regard to the books or in regard to the entries made therein, possibly with the exception of the item concerning the Guss transaction hereinafter mentioned."

Just one more word. Judge Wright sustained all of the separate demurrers to the Third Amended Petition. There was no appeal. Appellants pleaded over by filing a Fourth Amended Petition, and thereafter a Fifth Amended Petition. Judge Wright's opinion is final and conclusive, and left no issue for the Supreme Court of Missouri to pass on. Touching this exact point the opinion of the Supreme Court of Missouri in *Moffett* v. *Commerce Trust Company*, 193 S. W. 2d 588, l. c. 591, says:

"The correctness of the rulings on former petitions was not before Judge Ridge and, although previous

petitions are printed in the abstract, the question is not before us. By pleading over appellants waived the error, if there was such. Voorhees *v.* Louisiana Purchase Co., 243 Mo. 418, 147 S. W. 783; Tobin *v.* Bell Telephone Co., Mo. Sup., 199 S. W. 952; Buder *v.* Reller, Mo. Sup., 190 S. W. 2d 213."

Appellants contend that the alleged statements of the Weede counsel in her brief relating to the third amended petition (which was sustained by Judge Wright and which is not before this Court for review) amounted to a judicial admission that Judge Hay was corrupt. They admit that said statements were not made in open court but appear only in a brief. Therefore, if true, it did not constitute a judicial admission as defined by the courts.

In *Beattie Mfg. Co.* v. *Gerrardi*, 214 S. W. 189 (Mo. Sup. Ct.) the Court said: (l. c. 192)

> "It is next insisted by appellant that plaintiff's counsel, when the trial was nearing a close, admitted that the plaintiffs were foreign executrices, and by so doing admitted himself out of court, so to speak. To have the effect claimed for it, such admission must have belonged to the class termed 'judicial admissions.' It must therefore have been deliberately made for the purpose of being used as a substitute for the regular legal evidence of the fact at the trial (1 Greenleaf on Ev. Par. 205), for not every statement made by counsel casually, or in the heat of argument, or in colloquy with his adversary, is binding on his client (1 Enc. Ev. 467). • • • • •
> That respondents' counsel was at all times during the trial keenly alive to the legal situation is unquestioned. The record shows that up to the time of this conference at least he was vigilantly on guard and successfully parried all efforts of appellant's counsel to get this same matter into the record. It is evident therefore that the alleged admission was not made upon such circumstances as to be binding upon the respondent."

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In *Pitcairn* v. *American Refrigerator Transit Co. et al.*, 101 Fed. 2d 929 (C. C. A. 8) the court said: (l. c. 935)

"It is pointed out by the Wabash that at the conclusion of all the evidence, a motion was made by each defendant severally to dismiss the cause upon many grounds, among others that upon the undisputed evidence in the case, plaintiff was not entitled to an accounting upon the contract 'which the evidence shows was cancelled May 1, 1917, or fourteen years before the date of the filing of the second amended petition.' It is observed that this occurred at the conclusion of the taking of all the evidence. Manifestly, this action has in it no element of estoppel. It did not mislead the Wabash into any action taken, as the motion was made long after the acts which fixed the rights of the parties had taken place. It was not the admission of a fact by pleading or stipulation, but rather a legal conclusion based on the record made, and the admission of a legal conclusion is not binding on either the trial or appellate court, nor on the party by whom made. People *v.* Pittsburg R. Co., 244 Ill. 166, 91 N. E. 48; Bradway *v.* Miller 200 Mich. 648, 167 N. W. 15; Rousseau *v.* Brotherhood of American Yeomen, Mich., 139 N. W. 2; Auburn City Club *v.* McGeer, 198 N. Y. 160, 91 N. E. 539."

X

Comanche Case. Helen Moffett v. T. S. Moffett, et al., 131 Kan. 546; same, 283 U. S. 826.

One of the alleged causes of action pleaded in the Fifth Amended Petition appears in Paragraph 44 thereof (Appellants' Abstract, 319-321). In this paragraph Appellants charge that on July 14th, 1928, Appellee Weede (then Moffett) instituted a suit in the District Court of Comanche County, Kansas (Carl Miller, District Judge) to reform certain deeds by striking therefrom the name of Thomas S. Moffett. The petition charged that this was "the first open

attack of a series of attacks made by Appellees." The petition charges that the case was tried before Judge Miller in June, 1929. At the trial all parties were present and also represented by counsel. The petition charges that Appellee Weede, through her counsel, excused a witness so that he was not available to Defendant Thomas S. Moffett and by reason thereof said Thomas S. Moffett was "unable to offer said applications in evidence in said suit at the trial • • • that said Defendant Weede thus prevented said Thomas S. Moffett from offering said applications, and practiced a fraud on the court • • • that said fraud prevented a fair trial and was collateral and extrinsic to the issues • • • and resulted in a judgment against Thomas S. Moffett and deprived said Thomas S. Moffett and this Plaintiff of 1,127 acres of the most valuable land in Comanche County."

To state it more briefly, Appellants charge that by excusing a witness the Defendants in that case were prevented from identifying certain documents described in the petition (Appellants' Abstract, 320) which resulted in an adverse verdict, and that said alleged fraud was extrinsic and therefore the judgment was void. The petition does not claim that Appellants notified the court of the alleged excusing of the witness, nor did defendants ask for legal process to bring the witness into court, nor did they ask for a continuance until said witness could be procured. The petition shows that the defendants in that case went on with the trial and the trial judge (J. Carl Miller), after hearing from all parties, rendered a judgment in favor of Helen Moffett (then Helen Weede). The petition shows on its face that the alleged excusing of a witness (even if true) did not constitute extrinsic fraud and therefore did not render the judgment void. Defendant and his counsel knew as much about the alleged absence of the witness in

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June, 1928—the time of the trial—as they did when they filed this petition for damages in December, 1941. Appellants' Fifth Amended Petition failed to note that the judgment of Carl Miller was affirmed by the Supreme Court of Kansas on November 8th, 1930 (*Moffett* v. *Moffett*, 131 Kan. 546). It also failed to note that the Supreme Court of the United States denied a petition for a writ of error in said case on March 9th, 1931, 288 U. S. 826.

A significant hiatus existed between March 9th, 1931, and December, 1941, when Appellants filed their Fifth Amended Petition for damages.

The certiorari case just referred to is entitled:

"In the Supreme Court of the United States

October Term 1930

"Petition for Writ of Certiorari to the Supreme Court of the State of Kansas, and Brief in Support Thereof

"Filed February 2, 1931

No. 700

"Messrs. A. E. Watson and Martin J. O'Donnell for Petitioners."

The attorneys in the instant case were the same attorneys who tried the case before Judge Carl Miller in the District Court of Comanche County, and also before the Supreme Court of Kansas, 131 Kan. 546. On Page 547 the opinion sets out fully the findings of fact and conclusions of law of the trial judge. The opinion shows that the name of Thomas Moffett was stricken out of the deed. The opinion shows no complaint made in that court of the alleged excusing of a witness at the trial, or that the Defendants in that case were prevented from introducing the documents complained of on Page 320 of their petition.

For the purpose of demonstrating to the Supreme Court of the United States that the charge made on Page 320 that they were prevented from introducing certain documents at the trial of the case in the District Court of Comanche County, Kansas, by the alleged fraud of Appellees, we ask Your Honors to read Pages 5, 6 and 7 of the petition in Case No. 700—283 U. S. 826, being the case wherein Appellants' petition for writ of certiorari was denied. These pages of Appellants' record in that case completely annul and invalidate their petition and show that the exact documents complained of in their petition had been introduced in evidence by them at the trial of the case in Comanche County, Kansas.

We might extend this presentation by quoting from Appellants' record in Case No. 700, but inasmuch as that record is before Your Honors for examination we will content ourselves by repeating that the identical documents which they say they were prevented from introducing at the trial, appear in the aforesaid petition and record in this Court, and said documents were introduced by them and were before the court at the time Judge Carl Miller decided the case.

Plus this: The opinion of the Supreme Court of Missouri in the instant case, 193 S. W. 2d 588, passed upon but one issue, viz.: that Plaintiffs' Fifth Amended Petition contained a misjoinder of parties plaintiff and failed to state a joint cause of action. This Court will not review the opinion of the Supreme Court of Missouri on issues undecided by it. This assignment of error has no justification in law.

Said Comanche County case was tried during the lifetime of Thomas Moffett. There is nothing in the petition or in any record to show that any of the Appellees had any interest in the case. Appellants' charge that the suit men-

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tioned in said paragraph 44 (Appellants' Abstract, 320) was the first shot in this alleged conspiracy missed the mark.

XI

Jurisdiction is not vested in this Court by reason of Appellants' charge that Appellee instituted and maintained fictitious suits in the State courts, alleged to be pursuant to an unlawful conspiracy. (Appellants' Assignment of Error No. 26. Appellants' Jurisdictional Statement, Page 36.)

There has been a successful outcome against Appellants in all the cases which have been tried. The cases which have been tried, therefore, have been proven not to be fictitious but meritorious.

The fourteen alleged fictitious suits were all pending at the time this petition was filed, although three of them have since been dismissed. Such pending suits therefore could not be the basis for a recovery in this Court.

The law of Missouri is stated by the St. Louis Court of Appeals in the case of *Lindsay* v. *Evans*, 174 S. W. (2d) 390, as follows: (l. c. 395)

> "There is no doubt that among the necessary elements of a cause of action for a malicious prosecution is the requirement that the prior proceeding which is counted upon as the basis for the action shall have terminated in favor of the plaintiff in the malicious prosecution action. Higgins *v.* Knickmeyer-Fleer Realty & Investment Co., 335 Mo. 1010, 77 S. W. (2d) 805. Otherwise the plaintiff might be permitted to recover for the bringing of an action against him which the court entertaining such action might subsequently find to have been well brought, to say nothing of the fact that until he is able to show that the action against him was unsuccessful, he can show no damage for which he might recover. Moreover, a suit which is prematurely brought not be maintained, even though the

cause of action has perchance accrued by the time the case is called for trial; nor may an amended petition in such a case set up a cause of action which had not accrued at the time the original petition was filed. Jegglin *v.* Orr, 224 Mo. App. 773, 29 S. W. 2d 721."

The rule in Missouri that an action for a malicious prosecution may not be maintained until it is shown the previous action has been finally terminated in plaintiff's favor is well settled. See *Weber* v. *Strobel,* Mo. Sup., 225 S. W. 925, 927, *Kvasnicka* v. *Montgomery Ward & Co.,* 350 Mo. 360, 166 S. W. (2d) 503, 504.

Appellants have a complete remedy in the state court. Under the state law and practice they can force trials of these cases or their dismissal for failure of the plaintiff to prosecute with due diligence. See *Guhlman* v. *Growthe,* 346 Mo. 427, 142 S. W. S. W. (2d) 1, 2.

Furthermore it should be noted that by reason of the disposition adverse to Appellants of many of these alleged fictitious suits, there are only a few remaining to be tried, one of which is the case of Commerce Trust Company, Administrator of the partnership of *Moffett Brothers* v. *L. B. Andrews, J. C. Lewis, and T. S. Moffett,* No. 339, 134, referred to on Pages 297 and 298 of the petition, where it is alleged in effect that appellants, at the May Term 1944, in an attempt to minimize the damages still being suffered by plaintiff by reason of said fictitious and vexatious litigation aforementioned, presented a duly verified motion to dismiss said cause No. 339, 134, and called attention to the other vexatious and fictitious suits still pending, and that the Judge of said court "erroneously overruled said motion to dismiss and permitted said defendants to still continue said fictitious and vexatious suits on the docket of this court." The records in the Harper County case show that the subject matter of three of said claims, to-wit, the claim of John Moffett's estate against Moffett Brothers,

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the claim of Moffett Brothers against Thomas S. Moffett, and the claim of Moffett Brothers against Moffett Cattle, Land and Lumber Company, were disposed of adversely to the contentions of appellants.

Furthermore, the complaints as to the fictitious suits do not, we believe raise any federal question. In the case of *Thomson* v. *Butler*, 8 Cir., 136 F. (2d) 644, the court said: (l. c. 647)

> "We must hold, also, that the trial court was correct in declaring that it had no jurisdiction of plaintiffs' suit on the basis of a federal question being involved. Whether the will forgery and the perjury and other fraud, claimed to have been perpetrated by the proponents in the state court proceeding, would, if established, constitute sufficient grounds for annulling a judgment generally, in equity, there is no occasion for us to consider, because even if they could, they present no question here arising under the Constitution of the United States as plaintiffs contend. • • • There is no violation of the Fourteenth Amendment in litigation merely because the result is erroneous or unjust, or has been achieved by improper tactics on the part of one of the litigants, where the State's judicial processes are such as, on the basis of recognized principles, afforded the parties a fair opportunity for hearing and determination by the Court. Worcester Co. *v.* Riley, 302 U. S. 292, 58 S. Ct. 185, 82 L. Ed. 268; Central Land Co. of W. Va. *v.* Laidley, 159 U. S. 103, 16 S. Ct. 80, 40 L. Ed. 91; Fayerweather *v.* Rich, 2 Cir., 9 F. 721".

Furthermore, Judicial Code, Section 237 as amended, 28 U. S. C. A., Section 344, limits the right of appeal to this Court from the state courts to "a final judgment or decree in any suit in the highest court of a state." Obviously the pending litigation in state courts of first instance affords no Federal jurisdiction, violates no Federal right, and, we submit, is entitled to no consideration here.

XII

Appellants are completely in error in the contention that there is a right of action for conspiracy alone, independent of the damage caused by specific acts in furtherance of the conspiracy, either under the Statutes of the United States or of the State of Missouri. The "mere force of numbers" doctrine can have no application in the instant case. (Appellants' Assignment of Errors, Nos. 10, 11, 12, 13, 18, 26 and 31.)

Appellants, in order to escape the effect of the final judgments in previous Moffett litigation, upon which certiorari was denied by this court and to which we herein have directed its attention, apparently are contending that although in such litigation it was adjudged they were not wronged by the most important acts of which they complain, nevertheless they have a right of action based solely upon conspiracy, which cannot be barred by any adjudication that any or all of the specific acts of which they complain have done them no wrong. In this they are completely in error.

Of Sections 43, 47 and 48 Title 8, U. S. C., only Section 47 deals directly with conspiracy; and the recovery therein is specifically conditioned that

> "*If* one or more persons engaged therein *do or cause to be done, any act* in furtherance of the object of such conspiracy, *whereby another is injured* in his person or property, * * *" (emphasis added)

Sec. 48 id. gives a right of action against those having knowledge of any of the "*wrongs* conspired to be done," in favor of a party injured "for all damages caused by such wrongful act" which such person by reasonable diligence could prevent; and it is interesting to note that if

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the wrongful act caused death, the *legal representatives* of the deceased may recover *for the benefit of his widow.*" (emphasis added)

By reference to *O'Sullivan* v. *Felix*, 233 U. S. 318, l.c. 323, 325, 58 L. ed. 980, wherein this court affirming a dismissal of a civil rights damage suit on a plea of limitation, it is evident this court was clearly of the opinion that the right of action arose from the acts done pursuant to conspiracy and that the action could not be grounded on the conspiracy alone.

The last cited decision also construes Title 18 Sec. 51 U. S. C. as basing the right of action on the damage caused by the overt acts pursuant to the conspiracy and not on the conspiracy itself.

In *Mitchell* v. *Greenough*, 100 Fed. 2 184, rehearing denied id., 1006, certiorari denied 306 U. S. 659, 83 L. ed. 1056, the court construed the applicable provisions of Title 8 Sec. 47 U. S. C. as prohibiting the denial of equal protection for the purpose of preventing class legislation or action.

Title 18 Sec. 52 U. S. C. is a criminal statute, not covering conspiracy and the only pertinent decision as to civil liability thereunder which we find is *Brawner* v. *Irvin*, 169 Fed. 964, holding that Sec. 52 id., is a penal statute and that its infringement does not ground a civil action for damages.

Section 4633 R. S. Mo. 1939 is like Section 47 of Title 8, U. S. C. in making conspiracies with exceptions not here material, non-actionable in the absence of overt acts pursuant to the conspiracy. It reads:

> "Sec. 4633. What shall constitute conspiracy in certain cases. No agreement, except to commit a felony upon the person of another, or to commit arson or burglary, shall be deemed a conspiracy unless some act

besides such agreement be done to effect the object thereof, by one or more of the parties to such agreement."

In *State* v. *Dalton*, 134 Mo. App. 517, Judge Nortoni speaks of the modification of the common law of conspiracy by our "present statutory provisions requiring the commission of an overt act in certain cases," which refers to the last quoted statute.

Appellants cite *State* v. *Bacon*, 61 Atl. 653. In that case the discussion in the opinion on the law involved is based entirely upon the common law unmodified by our statutes referred to by Judge Nortoni, since the Supreme Court of Rhode Island definitely says:

> "Conspiracy is not a statutory crime or misdemeanor in Rhode Island * * * The common law offense cannot be enlarged by legislation and the only effect that statutory interpretation can have upon it must be to restrict or abridge it."

State v. *Bacon* was a criminal case, dealing with the criminal offense as it existed at common law. It is to be noted that the court holds that the only effect of statutes is to restrict or abridge the common law offense.

Appellants here rely on the "mere force of numbers" doctrine as referred to in *Shaltupsky* v. *Brown Shoe Co.*, 350 Mo. 831, 168 SW 2 1083, and *Baucke* v. *Adams* (Mo. App.) 188 SW 2 355, l.c. 366.

In the *Shaltupsky* case the court refused to apply the mere force of numbers doctrine holding that:

> "The alleged conspiracy charged was at most merely that the bank and Shoe Company each would do what each could do separately and what each, acting alone, could do without regard to motive or purpose in so doing."

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The word "mere" means "such (as is mentioned) and no more; nothing but; • • • unaided. • • • Pure; unmixed." In re *Plymouth Motor Corp.* 46 Fed. 2 l. c. 212. In other words, it is force of numbers alone, and not the individual reputation, power or prestige of certain individuals which is to be taken into consideration in appraising the power to do injury of the mass or mob. For instance, Commerce Trust Company, in proceeding after the death of John Moffett, and as personal representative of his estate, to collect the debts owing to that estate from Moffett Brothers' partnership, and in bringing a number of suits designated by appellants as "fictitious" was acting alone and nothing that the other appellees did or could have done in that connection could not have added to the nature or extent of the alleged injury. The appellants in the petition have laid emphasis upon the standing and resources of certain of the appellees. Those "soft impeachments" would add nothing to the force of a group in which the particular appellee was one, and "mere force of numbers" in itself implies the physical coercion of a group and does not pertain to the peculiar characteristics of individuals thereof.

XIII

Appellant's Charge of Libel

(300-304, Appellant's Abstract). This point does not seem to appear in Appellant's Assignment of Errors, but is presented in Section 22, Page 17, and Section 25, Pages 18-20 of Appellant's Motion for Rehearing, or, in the alternative, to transfer the instant case from Division No. One to Court En Banc of the Supreme Court of Missouri, which they seek to make a part of their jurisdictional statement.

The Petition shows on its face that this claim for damages was first presented in Appellant's fifth amended petition,

and claims damages for alleged offenses occurring during the trial of said cause. The Petition shows on its face that Appellants sued for damages in both capacities, and there was, therefore, a misjoinder of parties of plaintiff.

Time will not permit an extended presentation, but, broadly speaking, Appellant's Petition charged (301-304) that:

> "Appellees committed additional overt acts pursuant to the alleged conspiracy, with the design of destroying the standing of the plaintiff and her counsel in the community, which wilfully, deliberately, premeditately, maliciously, without just cause • • • and under all circumstances showing that they did so regardless of social duty and flatly bent on mischief, published of and concerning plaintiff in both capacities the following false, malicious, scandalous, defamatory, unprivileged and libelous statements charging plaintiff with guilt of said charges in every capacity • • • (322, 323). That her reputation for integrity has been injured by said libelous and defamatory statements and by said wrongful acts of the defendants pursuant to the conspiracy thereby alleged, resulting in actual damage to plaintiff in the sum of One Million Dollars."

And then the Petition asks for an additional One Million Five Hundred Thousand Dollars damages.

It will be noted that the claim for damages, both punitive and actual, had been increased by reason of the foregoing charges, One Million Dollars since the third amended petition was filed. Touching this point, the Supreme Court of Missouri in 193 S. W. (2d) L. C. 591, said:

> "Some of the acts complained of are alleged to have been performed long after Mr. Moffett's death and after the institution of the suit. Among other things it is alleged that some of the respondents, in briefs filed in the case 'published of and concerning plaintiff

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in both capacities the following false, malicious, scandalous, defamatory, unprivileged and libelous statements * * *

Then, in the Prayer, is stated that:

"Her reputation for integrity has been injured by said libelous and defamatory statements and by said wrongful acts * * * resulting in actual damage to plaintiff in the sum of One Million Dollars.'

The Prayer also is for punitive damages in the sum of One Million Five Hundred Thousand Dollars."

The Opinion then held, broadly speaking, that no joint cause of action is stated and that such defects appearing on the face of the Petition under the old Code could be reached by a demurrer.

Again, the Court said, in substance, the petition fails to state a joint cause of action, and it was unnecessary for the trial court and is unnecessary for this court to determine whether a cause of action is stated in favor of Appellants in either capacity.

When it became apparent that this portion of the Petition was demurrable for misjoinder of parties plaintiff, Appellants abandoned their claim for One Million Dollars damages on account of the libel and, speaking broadly, began to press their claim for damages for conspiracy.

It is stated elsewhere in this brief that the gist of an action for damages caused by conspiracy is the injury done and not the conspiracy alone. It is the judgment and not the alleged conspiracy through which a judgment was obtained that causes the damage.

Your Honors will note what we have heretofore said repeatedly, that the Supreme Court of Missouri did not pass on a Constitutional question relating to said charge of

libel. There was no Constitutional question involved, and the decision of the Court was wholly unrelated to said charge of libel.

In Section 22, Page 17, of Appellant's said Motion for Rehearing, they state:

> "This Court inadvertently overlooked the allegation of the fifth amended petition, disclosing that the false charges against appellant and her counsel were filed with the Judge of Division One (Judge Wright), (299, 301, 305), and that preparations and filing of these documents were, and were alleged to be (301) • • • additional overt acts pursuant to said conspiracy, etc."

This Court will note that this charge of libel is alleged to have been made in the brief filed in Division One (Wright's division of the Circuit Court) and not against the instant petition, but against the third amended petition. It is shown that Judge Wright sustained the demurrer, and that appellants, instead of appealing therefrom, filed their fourth, and then their fifth amended petition. We repeat that the judgment of Judge Wright, not having been appealed from, was final and conclusive. Not having been appealed from, it presented no question to the Supreme Court of Missouri, and it follows that the Supreme Court of Missouri, not having passed on the point, that question is not presented to this Court for review.

To emphasize the point, we quote from the opinion of the Supreme Court of Missouri, 193 S. W. (2d) 583, l. c. 591:

> "The correctness of the rulings on former petitions was not before Judge Ridge and • • • the question is not before us. By pleading over, appellants waive the error, if there was such. Voorhees *v.* Cole, 243, Mo., 418, 147 S. W., 783. Tobin *v.* Bell Telephone Co., Mo. Sup. 199, S. W. 952. Buder *v.* Weller, Mo. Sup. 190 S. W. (2d), 213.

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Appellant's petition further charges (306-307) that:

> "Said defendants by said false and defamatory statements, and by their representation to the Judge of said Division Number One (Wright's Division), that said Kansas judgments and opinions truthfully recited the jurisdictional facts on which they purported to be based, and that said judgments were therefore valid, and by concealing from said Judge the true facts, which were shown by the records aforesaid of said Courts, not to justify said judgments or opinions, but to deprive said Kansas courts of jurisdiction to render same, perpetrated a fraud on this Court then sitting in Division One thereof in the very act of obtaining said decision on said demurrers, and thus fraudulently caused said innocent and unsuspecting Judge to sustain them and to cause further delay * * * defendants further perpetrated a fraud on this Court sitting in Division One thereof by representing to it that said Kansas judgments were valid * * * and thereby caused said Judge in Division One to give full faith and credit to said void Kansas judgments when sustaining said separate demurrers, though said judgments were not before said Division One for decision, etc."

Your Honors will please note that the various decisions which appellants claim that we fraudulently pressed upon the Court, and deceived him into rendering a void judgment, were the same decisions we have heretofore cited over and over again, and to which, for identification, we will give the mere citation, viz.: 136 Kans. 711; 290 U. S., 602; 290 U. S. 642; 131 Kans. 582; 131 Kans. 546; 283 U. S. 826; 14 Fed. Sup., 602; 81 Fed. (2d), 431; 298 U. S. 675.

Elsewhere we have attempted to point out to Your Honors the fact that these decisions are final and approximately all of the questions presented by the instant appeal have been therein determined, and these cases are now before this Court for such use as you care to make of them.

XIV

Appellants complain that the opinion of the Supreme Court of Missouri, 193 S. W. 7, 588, denied Appellants their constitutional rights by giving validity to the acts of which we will hereafter denominate as de facto judges. Appellants claim that those judges were illegally appointed and their acts are void.

Broadly speaking, the record shows that appellants participated in, and without any objection, to the various acts of the special judges of the Probate Court of Jackson County, Missouri, without objection. At the outset appellees assert that the Supreme Court of Missouri did not pass upon the validity of the acts of said special judges, nor was it necessary to pass upon that issue in deciding the case. Therefore, that question is not before your Honors for review. We might rest this point upon the above statement, but we will briefly add that the acts of said special judges have been approved by all of the courts of Kansas and Missouri in which that question has arisen.

In *Moffett* v. *Moffett et al.*, 131 Kans. 582, 292 P. 947, the Court said, 582, "The Commerce Trust Company * * * having been previously duly appointed executor *de bonis non* of the will of John Moffett, deceased, and also administrator of the partnership estate of Moffett Brothers, in its two respective capacities * * *, 588, appellant contends that The Commerce Trust Company is intervening in two capacities which are in conflict, but we think there is no such conflict as would make it difficult for the trial court to ascertain and adjust the respective rights of the parties. On the whole it seems quite clear that there should be such an accounting as is prayed * * *."

Again in *Clark* v. *Moffett*, 136 Kans. 711, 292 P. 555, the Court took exactly the same attitude and made the same

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holding. This Court denied appellants petition for writ of certiorari in that case, 190 U. S. 602, 290 U. S. 642. Therefore, that case is before your Honors for examination.

The acts of a *de facto* judge of the Probate Court are as valid and binding as the acts of a *de jure* judge, and such acts cannot be attacked collaterally. In *State* v. *Douglas*, 50 Mo. l.c. 586, the Court said:

> "Nothing is better settled than the acts of an officer *de facto* (although his title may be bad), they are valid so far as they concern the public or the rights of third persons who have an interest in the things done (citing authority). Without this rule the business of a community could not be transacted. The public is necessarily compelled to do business with an officer who is exercising the duties and privileges of an officer under the color of right, and to say that his acts as to strangers should be void, would be productive of irreparable mischief. It would cause a suspension of business till officer's right to *de jure* was established."

In *State* v. *Miller*, 111 Mo. 542, l.c. 549, the Court said: "The provisions for appointing a temporary judge of the court was for the benefit of the public and when the conditions giving a right of appointment existed and an encumbent is in possession and active under color of right, public policy and justice require that his acts be held valid as far as they involve the interests of the public and of the third party (citing *Norton C. Shelby*, 118 U. S. 426 and many other authorities).

In 36 C. J. Page 1039, paragraph 2, it is said: "Reason for the rule: Litigants should not be permitted to try a case without objection before a special judge, taking chance upon the outcome of the trial with intentions of availing themselves of the benefit incident to favorable results and at the same time be accorded the right to question the

validity of such proceedings should an adverse verdict be rendered. And on page 1038 of 33 C. J., is the following: "Collateral attack—The acts of a *de facto* special judge cannot be overthrown in collateral attack (citing authorities)."

We invite your Honors' attention to the following, which sustained this caption:

Commonwealth v. *Stasio*, 8 N. E. 2, 923.

In re Manning 45 N. W. (Wis.) 26. The *Manning* case rests on *In re Burke*, 45 N. W. 24. We will present the syllabus of the *Burke* case, which reflects the opinion.

> "Laws of Wisconsin, 1889 C. 94, which establish the municipal court of the city and County of Ashland, was duly published March 15, 1889, and provides that it shall be in force from its publication; that a judge of said court shall be elected on the first Monday of April following, to hold office from the first Monday of January thereafter. And that in case of a vacancy, the Governor shall fill the office by appointment. On the date designated a judge was duly elected and two days thereafter the same person was appointed by the Governor to fill the office until the beginning of the electorate term. Held 'that such Court was legally in existence and said person was judge de facto thereof during the term of the appointment and that, as such, his acts were valid.'"

This case was affirmed *in re Manning*, 139 U. S. 504, in which the Court, in a very strong opinion, sustained the caption.

There are many cases to the same effect, but economy suggests that we do not cite them.

XV

We have endeavored to answer at least in principle, all of the relevant and pertinent suggestions of appellants bearing on the question of the appellate jurisdiction of this

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Court. This has necessarily made our suggestions quite lengthy, and in their preparation, because of the shortness of time, and the necessity of the work being parceled out to the several counsel, there may appear some repetition. If such is the case, we regret this necessity.

Motion to Dismiss or Affirm

WHEREFORE, appellees respectfully submit this STATEMENT showing that the questions upon which the decision in this case depends are so unsubstantial as not to need further argument, and appellees respectfully move the Court to dismiss this appeal, or in the alternative, to affirm the judgment of the Supreme Court of Missouri.

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APPENDIX

THE APPENDIX TO THE FOREGOING STATEMENT, REFERRED TO THEREIN, APPEARS ON THE FOLLOWING PAGES

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No. 29,807

THOMAS S. MOFFETT, *Appellant, v.* HELEN MOFFETT, THE COMMERCE TRUST COMPANY, Executor *de monis non* of the Will and Estate of John Moffett, Deceased, and the COMMERCE TRUST COMPANY, Administrator of the Partnership Estate of Moffett Brothers et al., *Appellees*

(292 Pac. 947)

SYLLABUS BY THE COURT

1. PARTNERSHIPS—*Death of Partner—Right of Widow to Accounting—Partition and Conversion of Firm Real Es-*

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tate. Two brothers were for many years partners in the live-stock and farming business, and purchased, with partnership funds, real property which was used in the business. The partnership was terminated by the death of one of them. Partnership debts to general creditors were paid. The surviving partner brought an action to partition the partnership real property, claiming a one-half interest in it by reason of his interest in the partnership. The widow of the deceased partner, who took under the law, by answer and cross petition alleged that the partnership was indebted to the deceased partner, that the surviving partner was indebted to the partnership, and that another partnership, composed of the deceased, plaintiff and two others who were beneficiaries under the will of the deceased, was indebted to the partnership, and asked for an accounting of this indebtedness to determine the interests of the parties in the real property sought to be partitioned. *Held,* such an accounting was proper.

2. SAME—*Partition of Firm Real Estate—Parties.* In a partition action, mentioned in syllabus 1, the administrator of the partnership estate and the executor *de bonis non* of the estate of the deceased partner intervened to have adjudicated the indebtedness between the parties for the determination of the interests of the parties in the property sought to be partitioned. *Held,* that it was proper to permit them to intervene.

Appeal from Harper district court; GEORGE L. HAY, judge. Opinion filed November 8, 1930. Affirmed.

E. C. Wilcox, of Anthony, *A. E. Watson* and *Martin J. O'Donnell,* both of Kansas City, Mo., for the appellant.

B. C. Howard, of Kansas City, Mo., for appellee Commerce Trust Company; *Orlin A. Weede,* of Kansas City, Mo., for appellee Helen Moffett.

The opinion of the court was delivered by

HARVEY, *J.:*

Plaintiff has appealed from an order of the court overruling his demurrer to the answer of the defendant, Helen

Moffett, also from an order of the court permitting the Commerce Trust Company to interplead.

Plaintiff in his petition alleged that for many years he and his brother, John Moffett, were equal copartners, under the firm name of Moffett Brothers, engaged in the live-stock and farming business and in the purchase and ownership of lands used in connection with that business, the title to the land being taken, sometimes in the name of the partnership, at other times in the name of one or the other of the members of the firm; that both of the partners resided at Kansas City, Mo., where the principal office of the partnership was located; that some of the partnership lands were situated in Kansas, where they were operated in connection with the partnership business; that the partnership was dissolved August 23, 1927, by the death of John Moffett; that the real property described in the petition, situated in Harper, Anderson, Pratt, Barber and Comanche counties, Kansas, was acquired and purchased with partnership funds and used in connection with the partnership business; that by reason of plaintiff's interest in the partnership he was the owner of an undivided one-half interest in the land; that on the death of John Moffett he left surviving him his widow, Helen Moffett, but no children; that the widow had elected, both in Missouri and in Kansas, to take under the law; that John Moffett left a will under the terms of which, as construed in plaintiff's petition, plaintiff was the beneficiary to the extent of 7/144 of the property of which John Moffett died seized; that by reason of his partnership interest in the property and his interest as beneficiary under the will of his brother, plaintiff was the owner of 79/144 of the real property described in the petition; that the defendant, Helen Moffett, was the owner of an undivided one-fourth of the property, and that brothers and sisters of John Moffett, other than plaintiff, living at the time of his death were the owners respectively of an undivided 7/144 of the property; and that all debts of the partnership, owing to general creditors, had been paid. The widow of John Moffett, his brothers and sisters, other than plaintiff, and others who might claim an interest in the property, were named as

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defendants. The prayer was that the respective interests of the parties be adjudicated and determined, and that the real property be partitioned.

The defendant, Helen Moffett, answered, admitting she was the widow of John Moffett, deceased; that she had elected to take under the law; that plaintiff and John Moffett for many years prior to his death were partners under the name of Moffett Brothers; that the real property in controversy had been purchased by partnership funds and used in the partnership business, and that partnership debts owing to general creditors had been paid; but alleged that the partnership was in debt to John Moffett in a large amount, and that the plaintiff was indebted to the partnership in a substantial sum; and further alleged that prior to the death of her husband there was a partnership composed of her husband, the plaintiff in this action and two other brothers, doing business under the name of Moffett Brothers Cattle, Land and Lumber Company, which partnership was indebted to Moffett Brothers in a substantial sum, and the defendant, Helen Moffett, in her answer prayed that before the land described in the petition should be partitioned an accounting should be had so as to determine her share or interest, as well as that of the plaintiff and other defendants, in the property sought to be partitioned.

The Commerce Trust Company of Kansas City, Mo., having previously been duly appointed executor *de bonis non* of the will of John Moffett, deceased, and also as administrator of the partnership estate of Moffett Brothers in its two respective capacities, made application to be permitted to intervene and allege facts much as were alleged in the answer of Helen Moffett as to why there should be an accounting prior to the partition of the real property in controversy. These applications to intervene were allowed. It would seem the order allowing these applications is not appealable (*Wagstaff* v. *Wagstaff*, 67 Kan. 832, 72 Pac. 780; *Howard* v. *Bank*, 107 Kan. 489, 192 Pac. 746; 3 C. J. 493), while an order denying them might have been (*Ousley* v. *Osage City*, 95 Kan. 254, 147 Pac. 1110). But we pass that question, since it is not specifically raised.

While we do not deem it important to the question presented, we are told in the briefs and arguments that the members of the partnership firm of Moffett Brothers Cattle, Land and Lumber Company, other than plaintiff and John Moffett, deceased, have filed answers in which they ask for an accounting prior to the partition of the real property in controversy.

Speaking broadly, the question presented is whether there can be, or should be, an accounting as between the members of the partnership of Moffett Brothers and of the alleged indebtedness of plaintiff, and of the Moffett Brothers Cattle, Land and Lumber Company, before there is actual partition of the real property in question. In the argument counsel have separated the question, broadly stated as above, into several points, but we deem it unnecessary to dissect it very much. Appellant alleged in his petition and the appellees concede in their answer and application to intervene, that the real property sought to be partitioned was purchased with partnership funds of Moffett Brothers and used in the partnership business, and that obligations owing to general creditors have been paid.

Appellant contends that because he was an equal partner with John Moffett in the business of Moffett Brothers he is an owner of an undivided one-half of the real property in controversy. Appellees contend that notwithstanding the fact that plaintiff was an equal copartner in the firm of Moffett Brothers he is not the owner of an undivided one-half interest in the assets of the partnership, including the land in controversy, for the reason that the partnership was heavily indebted to John Moffett, and plaintiff was indebted to the partnership, and the partnership of Moffett Brothers Cattle, Land and Lumber Company was indebted to the Moffett Brothers partnership. Appellant in his petition prayed that the respective interests of the parties to the action be adjudicated and determined. Appellees ask the same result, but say that in adjudicating and determining the respective interests of parties to the land in controversy it is necessary for the court to determine the amount and take into consideration the indebtedness above referred to. Appellant argues that any sum he owes to

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appellees can be recovered in an action at law, and that such indebtedness, if any exists, does not affect plaintiff's title or interest in the real property in controversy. Appellees contend that since the real property in question was partnership property appellant has only the share or interest therein which would be shown by an accounting as between the partners of the assets of the partnership. These contentions lead to the discussion of the nature of the property of real estate when the same is a part of the assets of a partnership—whether it is to be treated with all the attributes of real property, or as being converted into personalty, and if so converted, to what extent. Much has been written on the question, first and last. The English rule that partnership real property is regarded in equity as converted into personalty for all purposes, spoken of as "out and out" conversion, after some fluctuation of judicial opinions, was, in 1890, embodied in a statute (53 & 54 Vict., c. 39, secs. 20-22). The doctrine in America is stated in Ruling Case Law as follows:

"The rule prevailing in the United States is that, to the extent that partnership real estate may be required to pay partnership obligations or to pay any balance due from one partner to another in the settlement of its affairs, and only to that extent, the share of each partner is embraced in a trust implied by law which equity, in enforcing, treats as converted into personalty. When no longer needed for partnership purposes the land is relieved from the trust growing out of the partnership relation, and all the ordinary incidents and qualities of real estate revive. In America the doctrine of equitable conversion, as applied by the courts, gives to the laws of inheritance and descent their ordinary operation. On the death of either partner, where the title is vested in both, the share of the land standing in the name of the deceased partner descends as real estate to his heirs, subject to the equity of the surviving partner to have it appropriated to accomplish the trust to which it was primarily subjected. The working out of the mutual rights which grew out of the partnership relation does not seem to require that the character of the property should be changed until the occasion arises for a

conversion, and then only to the extent required. If a portion of the land is not required for partnership purposes and the adjustment of equities it retains its character as realty. • • • Ordinarily, when a partnership is dissolved, real estate constituting part of its assets may be divided by compulsory partition, provided it appears that it will not be required to satisfy liabilities of the firm. Yet the partition of lands belonging to a firm cannot take place until its affairs are settled. • • • " (20 R. C. L., 866, 870.)

Similar statements of the doctrine prevailing in the courts of this country are made in 22 A. & E. Ency. of L., 106, 107; 30 Cyc. 625, 626; 47 C. J. 1050, *et seq.;* Mechem on Law Partnerships, §§ 169, 402, and in the many cases cited in support of the texts above referred to and additional cases collected in the American Digest system under partnerships, key number, § 246. Our own cases are in harmony with this view. (*Ravenscraft v. Pratt,* 22 Kan. 20; *Tenney v. Simpson,* 37 Kan. 353, 363, 15 Pac. 187; *Cox v. Grubb,* 47 Kan. 435, 28 Pac. 157; *English v. English,* 53 Kan. 173, 35 Pac. 1107; *Sternberg v. Larkin,* 58 Kan. 201, 48 Pac. 861; *Getty v. Larkin,* 59 Kan. 548, 53 Pac. 755; *Hazen v. Webb,* 65 Kan. 38, 68 Pac. 1096; *Goodnough v. Webber,* 75 Kan. 209, 88 Pac. 879; *Reynolds v. Roberts,* 119 Kan. 281, 237 Pac. 931.)

This American doctrine is sometimes stated from the viewpoint that upon the termination of a partnership by the death of one of the partners the title to the real property, which is a part of the assets of the partnership, passes at once to the surviving partner and to the heirs or devisees of the deceased partner, who hold it in trust for the benefit of general creditors and the adjustment of the financial interests of the partners between themselves. The other viewpoint is that the real estate, in all of its aspects, is to be treated as personal property until the creditors of the partnership have been paid and the shares of the partners as between themselves have been determined. The application of these two viewpoints reaches the same result. The first viewpoint is the one usually applied when the facts and

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circumstances of a particular case require or justify its application, and the one which both the plaintiff and the defendant, Helen Moffett, have proceeded in accordance with in this case. Both take the position that on the death of John Moffett the title to the real property which was a part of the partnership assets passed to the surviving partner and to heirs and devisees of the deceased partner. The share or interest of the respective parties in such real property can be determined, of course, only by determining the status of the partnership and the obligations of each member to it and to each other.

Appellant contends that the court does not have power to make such an accounting in the partition action. In *Sawin v. Osborn*, 87 Kan. 828, 831, 126 Pac. 1074, it was said:

"While the remedy of partition is statutory, the court in enforcing it has substantially the same powers as were exercised by courts of chancery under the former equity practice."

And, after quoting the statute:

"Under this provision the court may partition the property under the broad principles of equity which govern courts in the administration of justice." (p. 832.)

It is the general rule that a court, in decreeing partition, has power to adjust the equitable rights of all the parties interested in the estate, so far as they relate to and grow out of the relation of the parties to the common property. (*Thresher Co. v. Judd*, 104 Kan. 757, 180 Pac. 763.)

Appellant contends that the action is not brought in the proper forum for an accounting. But the plaintiff chose this forum and is in no position to complain on that ground. Appellant contends that a proper accounting, such as asked for by appellees, would require the consideration of property situated in other states—Missouri and Oklahoma. But it is a principle of law, applicable to courts of equity, that such a court, having assumed jurisdiction of the subject matter, will reach out and draw into its consideration and its determination the entire subject matter, and bring before it all the parties interested therein, in order that a

complete and effectual final decree, adjusting the rights of all parties, may be entered and enforced. (*Hazen v. Webb*, 65 Kan. 38, 68 Pac. 1096; *Appel v. Smith*, 105 Kan. 732, 185 Pac. 903; the same case on rehearing, 106 Kan. 717, 190 Pac. 8.)

It is unnecessary to say much about the applications to intervene. It is clear from the allegations in these applications and from the answer of Helen Moffett, which are taken as true for the purpose of this appeal, that it will be necessary, to a substantial extent, for the trial court to treat the real property of the partnership as personalty, and to whatever extent that is necessary to be done the intervener, in its respective capacities, is a proper party to the action. Appellant contends that the Commerce Trust Company is intervening in two capacities which are in conflict. But we think there is no such conflict as would make it difficult for the trial court to ascertain and adjudicate the respective rights of the parties.

On the whole it seems quite clear that there should be such an accounting as is prayed for by the defendant and intervener in order to determine the respective interests of the parties in the land sought to be partitioned.

The judgment of the court below is affirmed.

644.) Now we are asked to say that a fraternal benefit society may disable itself to do the very thing it has been adjudicated that it can do so that it can live and function according to the benevolent purpose for which it was organized.

The plaintiff corporation operates not only under its charter and the pertinent statutes, but also under a constitution and by-laws of its own creation and which it may amend according to a procedure therein outlined. The benefit certificate which plaintiff seeks to have approved by the commissioner of insurance provides, in effect, that as between the plaintiff and the holder of such certificates the right of plaintiff to amend its constitution and to impose and collect whatever premiums, assessments and dues are necessary to enable it to live and function in accordance with the chartered purposes of the plaintiff shall not exist.

It seems to us that to require the commissioner of insur-

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ance to approve such a contract would violate the theory and purpose for which fraternal benefit societies are founded; consequently the writ prayed for must be denied, and it is so ordered.

BURCH and HUTCHISON, JJ., not sitting.

THIELE, J., not participating.

No. 30,826

GRACE TORRANCE CLARK, Administratrix with the Will Annexed of the Estate of Thomas S. Moffett, Deceased, and LOUISE McGREW MOFFETT, *Appellants, v.* HELEN MOFFETT et al. (THE COMMERCE TRUST COMPANY, Executor de bonis non of the Estate of John Moffett, Deceased, the COMMERCE TRUST COMPANY, Administrator of the Estate of Moffett Brothers, and R. O. ROBBINS, Administrator with the Will Annexed of John Moffett, Deceased, Interveners), *Appellees.*

(18 P. 2d 555)

Syllabus by the Court

PARTNERSHIPS—*Accounting and Settlement on Death of Partner—Review of Evidence.* In an action involving a partnership accounting, the record is examined and it is *held:* (1) The evidence sustains findings that the partnership was indebted to one of its members; (2) it was not error for the court to receive in evidence, as informative but not conclusive, a summary made by accountants from the partnership books; (3) the evidence sustains the finding that the members of the partnership had agreed to pay interest on moneys belonging to a member of the firm, but used by the partnership; (4) the fact that in making out personal income-tax returns for the federal government, interest accrued but not paid was omitted from the statement of partnership income, did not abrogate the agreement between the partners

to pay interest; (5) neither the statute of nonclaim nor the statute of limitations barred the accounting.

Appeal from Harper district court; GEORGE L. HAY, judge. Opinion filed January 28, 1933. Affirmed.

E. C. Wilcox, of Anthony, *A. E. Watson*, of Shawnee, and *Martin J. O'Donnell*, of Kansas City, Mo., for the appellants.

Guy O. Neal, of Anthony, *Orlin A. Weede*, *B. C. Howard*, *Glen A. Wisdom*, all of Kansas City, Mo., *H. A. Wilkinson*, *James R. Eagleton* and *S. A. Horton*, all of Oklahoma City, Okla., for the appellees.

R. O. Robbins, of Sedan, *pro se*.

The opinion of the court was delivered by

HARVEY, J.: The partnership of Moffett Brothers, composed of John Moffett and Thomas S. Moffett, was dissolved by the death of John Moffett, August 23, 1927. John Moffett left a will, which, after making specific bequests, left the residue of his property to certain relatives. His widow elected to take under the law. The partnership owned a large amount of real property situated in several counties in Kansas and in Missouri. On August 15, 1929, the general debts of the partnership having been paid, Thomas S. Moffett brought this action to partition the Kansas land belonging to the partnership. The defendants named were the widow of John Moffett and the devisees under his will. John and Thomas S. Moffett were also in partnership with their brothers, Renwick J. Moffett and Joseph W. Moffett, under the firm name of Moffett Brothers Cattle, Land and Lumber Company. The business of this partnership was conducted principally in Oklahoma. Renwick J. and Joseph W. Moffett were beneficiaries under the will of John Moffett and were made parties defendant in the partition action. Helen Moffett, the widow of John Moffett, answered in the partition action, conceding that the lands should be partitioned, but alleged that the partnership of Moffett Brothers was indebted to John Moffett individually, that Thomas S. Moffett individually was indebted to the partnership of Moffett Brothers, and that the Moffett Brothers Cattle, Land and Lumber Company was indebted to the partner-

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ship of Moffett Brothers. These matters were set up in a cross petition, and she asked that an accounting be had of such indebtedness, and the sums, if any, found to be due taken into consideration in determining the shares of interest of the respective parties in the land to be partitioned. The Commerce Trust Company, in its dual capacity of executor *de bonis non* of the will and estate of John Moffett and as administrator of the partnership estate of Moffett Brothers, by leave of court intervened in the action, and it and other defendants sought an accounting and partition. The action came to this court on the pleadings (*Moffett v. Moffett*, 131 Kan. 582, 292 Pac. 947), where it was determined that the accounting prayed for was proper.

When the action went back to the trial court, broadly speaking, the only controversy between the parties was with respect to the accounting. The will of John Moffett had been construed as it affected some of the beneficiaries, both by this court. (*Moffett v. Moffett*, 131 Kan. 546, 292 Pac. 942) and by the supreme court of Missouri (*Zombro v. Moffett*, [Mo.] 44 S. W. 2d 149). There was no longer any controversy among the parties as to the share or interest which each of them should receive in the land to be partitioned except as the same might be modified by the accounting.

Broadly speaking, there were but three things to be determined in the accounting. *First*, were Moffett Brothers indebted to John Moffett individually at the time of his death, and if so, in what sum? *Second*, was Thomas S. Moffett indebted to the partnership of Moffett Brothers, and if so, in what sum? And *third*, was the Moffett Brothers Cattle, Land and Lumber Company indebted to Moffett Brothers, and if so, in what sum?

After hearing the evidence the trial court made exhaustive findings of fact, and found, on accounting to the date of October 31, 1931, that the estate of Moffett Brothers was indebted to the estate of John Moffett in the sum of $143,829.96; that the estate of Thomas S. Moffett (he having died after the action was brought) was indebted to the estate of Moffett Brothers in the sum of $27,399.25, and that Moffett Brothers Cattle, Land and Lumber Company was in-

debted to the estate of Moffett Brothers in the sum of $101,228.06. The court rendered judgment in accordance with these findings. The present appeal is by plaintiffs from this judgment and the findings on which it was based. On this appeal, broadly speaking, no question is raised as to the amount found by the trial court to be due from Moffett Brothers Cattle, Land and Lumber Company to the estate of Moffett Brothers. Neither is there any question raised as to the amount found by the trial court to be due from the estate of Thomas S. Moffett to the estate of Moffett Brothers. The only major question over which any controversy is presented by this appeal relates to the correctness of the trial court's finding that the partnership of Moffett Brothers was indebted to the estate of John Moffett in the sum of $143,829.96. With respect to that, broadly speaking, appellants make two contentions. *First*, that the evidence does not support the findings of the trial court; but, coupled with this is the contention that the court received incompetent evidence on that point; and, *second*, that the court erred in computing and including interest on the amount of the indebtedness of Moffett Brothers to John Moffett individually.

This controversy, so comparatively simple in its broader aspects, as above outlined, has been complicated by the manner in which the litigation has been conducted by injecting into it a number of questions relating to practice or procedure and technical questions, many of which have little or no substantial merit, with the result that the parties have presented to this court for its analysis and its consideration 1740 pages of printed abstracts and briefs. Notwithstanding the extraordinary and wholly unnecessary bulk of the matter presented, we have endeavored to go through it carefully and painstakingly, and have done so as fully as our time would permit, and will treat and dispose of all the questions presented that have any semblance of merit.

We shall take up, first, the principal question presented by this appeal. Does the evidence sustain the finding that Moffett Brothers was indebted to John Moffett? On this point the evidence may be summarized as follows: John Moffett and Thomas S. Moffett resided at Kansas City, Mo.

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They were equal partners in the firm of Moffett Brothers. When this partnership was formed is not definitely shown, but it had existed a long time, perhaps thirty years or more, when it was dissolved by the death of John Moffett. It was engaged in the ranching and live-stock business and owned and operated a number of farms and ranches and had offices in the Livestock Exchange Building at Kansas City. John Moffett spent most of his time at the office, where they had bookkeepers and other clerical help. Thomas S. Moffett spent most of his time looking after the farms and ranches and the live stock thereon, going back and forth from the office to the various ranches. Each of them had property owned individually. Both of them were members of the partnership firm of Moffett Brothers Cattle, Land and Lumber Company, which was engaged in the live-stock, land and lumber business in Oklahoma, the field work being looked after by the Oklahoma brothers, but the office business transacted at the Kansas City office. Both John and Thomas S. Moffett were members of a partnership known as Moffett Brothers & Andrews, which was also engaged in the live-stock business. One or both of them were interested as members or otherwise in four other partnerships, namely, Andrews, Lewis & Moffett, Andrews & Lewis, J. C. Lewis & Co., and Andrews & Moffett. The books of all these partnerships and of the personal business of John Moffett, and perhaps the personal business of Thomas S. Moffett, were kept in the one office at Kansas City and by the same office force. Collectively they transacted a large volume of business, amounting to many thousands of dollars each year. While notations or entries were made to identify the business of each of the partnerships or individuals, it was all entered in a common ledger which bore the name of "Moffett Brothers & Andrews Ledger." About 1924 they had a firm of accountants examine these books and open a separate set of books for the partnership of Moffett Brothers. Separate books were also opened for the partnership of Moffett Brothers Cattle, Land and Lumber Company. Separate books were opened for some, perhaps all, of the other partnerships, but that is not material here. The business of the partnership of Moffett Brothers thereafter was kept in the

books of that firm until the death of John Moffett, and thereafter to the time of the trial of this action. These books were in court at the trial, and the entries in them, the testimony concerning some of those entries, and a summary of them prepared by accountants, known in this record as "Commerce Trust Company Exhibit No. 8," constituted the evidence on which this finding was based. This evidence shows this indebtedness exactly as found by the court, hence there is no lack of evidence to sustain the finding.

Appellants complain because the court received in evidence the summary of the books made by the accountants, "Commerce Trust Company Exhibit No. 8," and contend that it was incompetent and hearsay, and they contend that without it the evidence was insufficient. Naturally the original books were voluminous. They had been brought to the court in large boxes and trunks. They had been in possession of the plaintiffs, who had helped keep the books in recent years and were familiar with them. It was appropriate for a summary to be made by some one from them, collecting and properly setting down the entries or items bearing upon the controverted issues to be determined by the court. The trial court admitted this summary in evidence as informative only and not conclusive, and permitted the parties to refer to the original books as much as they desired and gave them ample time to do so. All other evidence relating to this indebtedness, the books and entries therein which either party offered, was received by the court. There is no contention now that this summary was not an appropriate and accurate one compiled from the books of the partnership. There was no error in receiving it in evidence.

Appellants complain that the sum found due from Moffett Brothers to John Moffett individually includes interest on sums the partnership owed John Moffett. The court found there was an agreement between John and Thomas S. Moffett that interest should be paid on such sums. Appellants contend there is no evidence to show such an agreement, and that the allowance of interest was not justified. On this point the evidence was substantially as follows: The various partnerships and individuals doing business from a

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common office and keeping the record of their business in a common set of books, and all engaged in the same general line of business, frequently had occasion to borrow money in substantial sums. Sometimes these loans were made from banks; sometimes they were made from one of the other partnerships or individuals having money on hand which could be used for that purpose. The books disclosed these various loans, and always computation of interest on them. This had been done for all the years as far back as the books were examined for that purpose. There was testimony that John Moffett and Thomas S. Moffett frequently discussed in the office these various loans, the interest which should be charged by reason of them, and the entries made showing such interest charges. The books clearly show that John Moffett's individual money, sometimes in large amounts, was used by Moffett Brothers, appropriate entries being made in the books, and that he was credited with interest from time to time. At the time of his death the books of Moffett Brothers showed an indebtedness to John Moffett. A substantial part of that amount, perhaps a fourth of it, was interest which had been credited to his account from time to time. Thomas S. Moffett undertook to administer the estate of the Moffett Brothers partnership as surviving partner under the common law, and in doing so took charge of the books and made, or caused to be made, additional entries therein crediting interest, and made payments from the estate of Moffett Brothers to the personal representative of the estate of John Moffett from time to time. From all of this the court was justified in finding that there was an understanding and agreement between John Moffett and Thomas S. Moffett by which interest should be credited and paid by Moffett Brothers to John Moffett on sums which he advanced individually to the partnership.

While on this question of interest we shall dispose of the question argued of interest on the indebtedness of the partnership of Moffett Brothers Cattle, Land and Lumber Company to the partnership of Moffett Brothers. The trial court did not allow interest on that indebtedness, although the books kept at Kansas City showed interest was computed thereon and added to the account. The evidence on

this point was that this partnership was composed of the four brothers; that by its terms when formed, the two brothers, Renwick J. Moffett and Joseph W. Moffett, were to devote their time to the business in Oklahoma, the other two brothers, John Moffett and Thomas S. Moffett, were to furnish the money to finance it, and that they were to own, in equal shares, the property of the partnership in Oklahoma, and that there was no agreement among them that interest would be charged on the money so furnished. Renwick J. Moffett and Joseph W. Moffett were not at Kansas City often. They had nothing to do with keeping the books there, their attention at no time was called to the fact that on those books interest was charged to them for money advanced in the business, hence the court charged that partnership only with the money advanced by John Moffett and Thomas S. Moffett, doing business as Moffett Brothers. No serious complaint is made by anyone on this appeal of that ruling, but appellants argue that the trial court was inconsistent in charging Moffett Brothers with interest on the money advanced to it by John Moffett, and not charging interest to the Moffett Brothers Cattle, Land and Lumber Company for moneys advanced to it by John and Thomas S. Moffett, doing business as Moffett Brothers. There is no inconsistency in the court's rulings on those matters, for the one was based upon an agreement and understanding that interest would be charged and paid, and the other based upon a partnership formed with an understanding that interest would not be charged. In other words; the court's findings are based upon the agreements as shown by the evidence, and are fully borne out by the evidence.

Appellants present another argument as to why interest should not have been included in the amount which the court found to be due from Moffett Brothers to John Moffett, personally. Prior to 1924, in making out their income-tax returns to the federal government, John and Thomas S. Moffett had not furnished to the internal revenue collector statements of their partnership transaction and with the source of income therefrom. Their attention was called to that by the internal revenue collector and a request made that the partnership transactions be shown in their returns.

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Perhaps that is the reason they called in accountants and had separate books made up for the partnership business of Moffett Brothers and other partnerships in which they were interested. When these books of the partnership of Moffett Brothers were made up by the accountants they showed a sum due from the partnership to John Moffett, personally, and that a part of the sum consisted of interest accumulations. Because these interest items had been credited to John Moffett on the books of Moffett Brothers, and the books did not show they had been paid, it was deemed proper to omit them from the reports furnished the government until they were paid. There is evidence tending to show that was the appropriate method of making that report. So, the informative statement respecting the partnership required by the internal revenue department to accompany the income-tax-return statement made by John Moffett and by Thomas S. Moffett, individually, was made omitting all items of interest charges which had not been paid. Appellants attempt to make much out of this. They say John Moffett and his personal representative are estopped from claiming interest; that this statement so furnished the government amounted to an admission in pleadings and is an adjudication on the question of interest; that there is a collateral attack, and that the parties now claiming interest came into court with unclean hands. We have carefully considered all appellants have said in this connection and conclude that it has no bearing at all upon the question of whether there was an agreement between John Moffett and Thomas S. Moffett that Moffett Brothers would pay interest on sums to individual members loaned from their private funds for the partnership business. These partnership statements, requested by the federal government in connection with internal revenue reports of individuals, are requested and furnished for the information of the federal government as to the source of income of the individual taxpayers. Whether accurate or inaccurate, they do not increase or diminish the amount of tax to be paid by the taxpayer. There is no basis in the evidence for the thought that either John Moffett or Thomas S. Moffett desired to defraud the federal government in any respect in making out these tax returns or the informative

partnership statements. They were advised that the proper way to make this partnership statement was to omit interest items which had been credited or charged but which had not been paid. There is nothing in the evidence from which the court could have found that by doing so they were agreeing, as between themselves, to abandon the practice and agreement theretofore existing between them with respect to these interest charges.

It is interesting to note in this argument over interest that Thomas S. Moffett was indebted to Moffett Brothers for partnership moneys which he had used in his private business. Interest charges were made on the books against him on those items and are included in the amount found due the estate of Moffett Brothers from the estate of Thomas S. Moffett, and although one of the appellants here is the sole beneficiary under his will, no complaint is made that he is charged interest on the amount he owed. We approve the finding of the trial court with respect to all of these interest items.

Appellants question findings of the court with respect to a few of the specific items which entered into the accounting. They also objected to some of the findings of fact made by the trial court and requested additional findings which the court did not make. We have carefully examined the contentions of appellants respecting these matters and find them not to be well taken. It would serve no useful purpose to state and analyze them in detail.

Passing now to some of the other questions argued. It is argued that the claim of the personal representative of the estate of John Moffett against the estate of Moffett Brothers is barred both by the statute of nonclaim and the statute of limitation, both of Kansas and Missouri. Passing the fact that it appears this claim was timely filed in the probate court, both in Missouri and in Kansas, as found by the trial court, there are two reasons why this contention has no merit. *First,* the failure to file a claim within the time of a nonclaim statute of another state does not preclude a party from establishing that claim in an appropriate action in this state. (*Toner v. Conqueror Trust Co.,* 131 Kan. 651, 293 Pac. 745.) *Second,* neither the statute of nonclaim (*Carr v. Catlin,* 13 Kan. 393, 407) nor the statute of

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limitation is available to one of the parties to bar an appropriate accounting of a partnership before the amount due, as between the parties, is ascertained. (*Finley v. Gilmore*, 107 Kan. 349, 191 Pac. 256.)

Appellants contend that the Commerce Trust Company is without capacity to represent the Moffett Brothers partnership in this action. When the case was in this court before, one of the points determined was that it was proper for the trial court to permit the Commerce Trust Company to intervene in this action in its capacity as administrator of the partnership estate of Moffett Brothers. Ignoring the former determination of this question, appellants present two reasons in support of their contention. *First*, that the appointment was made by one who assumed to act as special judge, or judge *pro tem.*, of the probate court of Jackson county, Missouri, who was not so chosen in accordance with the constitution and statutes of Missouri, therefore his order making the appointment is void. The trial court found that his selection was made in accordance with the constitution and statutes of Missouri, as interpreted by the supreme court of that state. The finding appears to be sound. But, passing that, he was there acting as judge of the probate court and did make the appointment. No appeal has been taken from that order. The Commerce Trust Company has been acting under the appointment since December 28, 1928. He was at least a judge *de facto*. The regularity of his appointment, or his acts as judge, cannot be collaterally attacked in this proceeding. (*Briggs v. Voss*, 73 Kan. 418, 85 Pac. 571; *Keys v. Keys*, 83 Kan. 92, 109 Pac. 985.) *Second*, it is argued that even if the appointment of the Commerce Trust Company in that capacity was made, it was for Missouri only and did not authorize it to appear in Kansas. Our statute (R. S. 22-1308) authorizes an administrator of another state to sue or be sued in this state. There is no reason for having two or more persons appearing as an administrator of the partnership estate of Moffett Brothers in this action. Certainly it should not be permitted unless one is ancillary to the other and they act in harmony. If they attempted to act in conflict with each other it was proper for the trial court to recognize in this action the Commerce Trust Company as the administrator

of the partnership estate of Moffett Brothers and make its orders accordingly.

Appellants contend that the court erred in reviving this action on the death of the plaintiff. The record discloses that Thomas S. Moffett, who brought the action as plaintiff, died December 22, 1930, testate; that his widow, Louise McGrew Moffett, is sole beneficiary under his will. The will was duly probated in the probate court of Jackson county, Missouri, and his widow was named as executrix. Grace Torrance Clark was appointed administratrix with the will annexed of the estate of Thomas S. Moffett by the probate court of Wyandotte county, Kansas. Helen Moffett, the defendant and cross petitioner in this action, filed therein a motion to revive the action in the name of Louise McGrew Moffett, sole beneficiary under the will of Thomas S. Moffett, and in the name of Grace Torrance Clark as administratrix with the will annexed. Notice was served upon them that the motion to revive would come on for hearing before the court on February 6, 1931. On February 5, 1931, Louise McGrew Moffett, individually and as executrix of the estate of Thomas S. Moffett, deceased, and Grace Torrance Clark, as administratrix with the will annexed, filed an action in the circuit court of Jackson county, Missouri, and procured a temporary order restraining the defendants in this action from reviving it. This restraining order was served upon the attorneys of Helen Moffett. On February 6, when the motion to revive came up in the trial court, counsel representing Helen Moffett, who had been served with the restraining order, advised the court of the fact that the restraining order had been served upon him and of its contents. Counsel, who had previously appeared for plaintiff, announced he was appearing simply for other attorneys for plaintiff and questioned the jurisdiction of the court to proceed. He later stated he was appearing for Louise McGrew Moffett. The court inquired what objections there were to the reviver, found no substantial objections were presented, observed it was the duty of the court under the statute (R. S. 60-3211, 60-3212) to make the order if no valid objections were presented, and made an order reviving the action in the name of Grace Torrance Clark, administratrix with the will annexed of

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the estate of Thomas S. Moffett, deceased, and Louise McGrew Moffett, sole beneficiary of the will of Thomas S. Moffett, deceased. There is no error in this ruling.

Thereafter Louise McGrew Moffett filed a petition for removal to the federal court of what was alleged to be a separable controversy between herself and the defendants Renwick J. Moffett and Joseph W. Moffett with respect to the indebtedness of the estate of Moffett Brothers to the estate of John Moffett, and alleging diverse citizenship. When this was presented to the trial court it refused to order a removal of the cause. A transcript of the proceedings was duly filed in the United States district court. That court, after a hearing, ordered it to be remanded to the state court. There was, of course, no separable controversy between Louise McGrew Moffett on the one hand and Renwick J. Moffett and Joseph W. Moffett on the other with respect to the indebtedness of Moffett Brothers to the estate of John Moffett. That is a matter in which Helen Moffett and others who were parties to the partition action were interested. This was shown by pleadings on file with the court. Thomas S. Moffett had not attempted to remove this case when pleadings raising those issues were first filed. There was no error in the ruling of the trial court on this point.

Since the order of reviver, and since the attempted removal, plaintiffs, by leave of court, filed revised and amended pleadings on which the action was fully tried. The contentions made on these matters had no merit in their inception and now have less merit (if that is possible), since the action has been fully tried on revised pleadings subsequently filed.

Appellants contend the court erred in the scope of its decree: (1) By considering property situated in other states and adjudging the rights of the parties to this action with respect thereto. This was done only with respect to property conceded to be a part of the assets of the partnership of Moffett Brothers, and was necessary to a full accounting to determine the shares or interest of the parties to this action in the Kansas land sought to be partitioned herein. That the court had authority to do so, and that this is a proper case for the court to exercise such authority, was

determined on the former appeal. (*Moffett* v. *Moffett* 131 Kan. 582, 588, 292 Pac. 947.) More than that, with the equities among the parties determined by the accounting adjusted out of the Kansas properties, there is no controversy among the parties as to their respective shares to the real property situated in other states. (2) In taking to itself authority which is tantamount to the administration of the estates of the partnership of Moffett Brothers and of John Moffett and of Thomas S. Moffett, to the exclusion of and superseding the probate court of Jackson county, Missouri, and the probate courts of two or more counties in Kansas, where steps have been taken for the administration of one or more of those estates. The decree of the court is not open to this objection. The court did this only to the extent necessary to the accounting and partition, and to that extent it was proper to do so. Neither can we see that the decree in this respect operates to the detriment of any one. The personal representative of Moffett Brothers; the heirs, devisees and personal representatives of John Moffett; the sole beneficiary of the will of Thomas S. Moffett, and his Kansas personal representative, are parties to the action and bound by the decree. Indeed, it is to the advantage of the parties to have all questions relating to the accounting and partition before the court settled once and for all in one court having general jurisdiction and having power and authority to hear and determine the matter. There are no general creditors of the estate of Moffett Brothers, nor of the estate of John Moffett. We are not advised whether there are general creditors of the estate of Thomas S. Moffett, other than his indebtedness to the estate of Moffett Brothers adjudicated in this action. If there are such, we do not understand the decree of the court to prevent them from filing their claims in the probate court of Jackson county, Missouri, in the estate of Thomas S. Moffett. But since no specific question relating to that point is before us, we do not decide it. At times it is unfortunate that in this state important orders may be made by a probate court without notice to other interested parties and an opportunity for them to be heard. The probate courts have authority to require notice, but too

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frequently it is not done. Some such orders have been made in the early stages of the estates above mentioned, resulting in confusion, if not in serious detriment. The decree of the trial court will avoid such orders and will aid in the prompt and orderly determination of the rights of the parties.

Finally it is contended plaintiffs did not have a fair trial, and that this is indicated by rulings and remarks of the court as the trial progressed. We have carefully examined the record and all counsel have said on this point and find the contention to be devoid of merit. As before stated, the parties were in agreement as to the shares of the parties in the real property to be partitioned, except as they might be modified by an accounting. The accounting involved (1) the amount the Moffett Brothers Cattle, Land and Lumber Company owed Moffett Brothers; (2) the amount Thomas S. Moffett owed Moffett Brothers; and (3) the amount Moffett Brothers owed John Moffett. As to the first two of these three items, while the amounts had to be ascertained, they presented no serious controversy. The parties appear to be satisfied with the judgment concerning them. They are involved in this appeal incidentally only. The third item is the one around which the battle of the trial raged. Much feeling was displayed. What caused this, or who is to blame for it, we shall not pause to consider, if, indeed, the record discloses. Perhaps because of it many contentions were made which were not well founded. Some tactics were indulged in, the obvious purposes of which were to impede rather than to aid the orderly administration of justice. With this attitude prevalent it is fortunate that the trial was before an able and experienced trial judge who could winnow the wheat from the chaff. While doing so the court gave the parties ample time for trial and a fair opportunity in the introduction of evidence. The judgment is fully sustained by the evidence, and, as we view it, in its main features, at least, is the only one which properly could have been reached from the evidence.

The judgment is affirmed.

THIELE, J. not participating.

Moffett et al. **v.** ***Robbins,*** **No. 1307. Circuit Court of Appeals, Tenth Circuit, Jan. 15, 1936.**

1. Judgment 576(1).

Final judgment rendered by court having jurisdiction of subject-matter and parties is conclusive upon parties and their privies in subsequent action upon same cause of action as to all matters actually litigated or which might have been litigated therein, notwithstanding that judgment may have been erroneous in fact or law.

2. Judgment 720.

Judgment operates as estoppel between same parties in subsequent proceeding upon different cause of action only with respect to matters actually litigated and adjudicated in prior proceeding.

3. Courts 509

United States court cannot vacate judgment or decree of state court, nor mandate that court to do so.

4. Courts 508(3)

United States court may restrain enforcement of judgment fraudulently obtained in state court if requisite elements of federal and equitable jurisdiction exist, but in so doing, court does not review irregularities in proceedings, but considers conduct of successful party, and injunction acts upon party and does not affect judgment.

5. Courts 508(3)

United States court will restrain enforcement of judgment fraudulently obtained in state court only upon fraud extrinsic to matters tried and determined by state court which caused court to render wrong judgment.

6. Courts 508(3)

Party suing to enjoin enforcement of judgment fraudulently obtained in state court must show valid defense to cause of action on which judgment was rendered, that he was prevented by extrinsic fraud, accident, mistake, con-

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cealment, or other chicanery from presenting such defense, and that he had not been negligent in availing himself of it.

7. Courts 508(3)

Petition to enjoin enforcement of judgment of state court adjudicating indebtedness of partnership estate on ground that claim against partnership was without foundation, that executor of estate of deceased partner violated fiduciary duty in establishing claim, and that evidence produced to establish claim was unreliable, showed intrinsic fraud, and was insufficient to entitle complainant to injunction, notwithstanding allegation that matters occurred in consequence of conspiracy.

8. Courts 508(3)

Executrix of estate of deceased partner *held* not entitled to injunction against enforcement of judgment of state court establishing indebtedness of partnership on ground of secret conferences between counsel for claimants and trial judge, where trial was continued without objection after knowledge thereof and question decided on motion for new trial, and it was not alleged that judgment would have been otherwise except for conferences.

9. Courts 508(3)

Executrix of estate of deceased partner *held* not entitled to injunction against enforcement of judgment obtained in state court establishing indebtedness of partnership estate on ground of secret conferences between counsel for claimants and trial judge concerning judgment which were not known to plaintiff until after affirmance of judgment, in absence of showing that outcome of litigation was affected thereby.

10. Courts 508(3)

Executrix of estate of deceased partner *held* not entitled to injunction against enforcement of judgment obtained in state court establishing indebtedness of partnership on ground that administratrix of partnership estate was not party to action, where person who assumed to act as administratrix of partnership estate revived action in which judgment was obtained in her name as administratrix of

estate of deceased partner, and, as such, administered estate of partnership and was so regarded throughout litigation.

11. Courts 508(3)

Question whether claim against partnership had been barred by statute of another state *held* question of limitation, presenting no federal right reviewable in suit to restrain enforcement of judgment against partnership on such claim (Rev. St. Kan. 1923, 60—310; Mo. St. Ann. § 90, p. 55).

12. Courts 508(3)

Executrix of estate of deceased partner *held* not entitled to enjoin enforcement of judgment obtained in state court establishing indebtedness of partnership estate on ground that claim had been barred before judgment by statute of state in which partnership estate was administered, and hence judgment contravened full faith and credit and due process clauses of Constitution, where Supreme Court of state in which judgment was obtained had determined that claim was not barred, regardless of whether determination of state court was correct (Mo. St. Ann. § 90, p. 55; Rev. St. Kan. 1923, 60—310; Const. art. 4; Amend. 14).

13. Courts 508(3)

Executrix of estate of deceased partner *held* not entitled to restrain enforcement of judgment obtained in state court establishing indebtedness of partnership, on ground that there had been no adversary trial, where all interested parties had been joined in action and record showed that trial consumed several days, during which all questions were seemingly thoroughly considered and extended findings of facts and conclusions of law were made, and exhaustive judgment entered.

14. Judgment 407(4)

Contention that judgment was not supported by evidence can be determined only on appeal, and cannot be decided in equitable action to enjoin enforcement of judgment.

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Appeal from the District Court of the United States for the District of Kansas, Third Division; Richard J. Hopkins, Judge.

Suit by Louise McGrew Moffett, executrix of the estate of Thomas S. Moffett, deceased, and another against R. O. Robbins, administrator with the will annexed of the estate of John Moffett, deceased. From a decree (— F. Supp. —) dismissing the third amended and supplemental bill, the complainants appeal.

Affirmed.

Martin J. O'Donnell, of Kansas City, Mo. (A. E. Watson and William Buchholz, both of Kansas City, Mo., on the brief), for appellants.

Orlin A. Weede, of Kansas City, Mo. (R. O. Robbins, of Sedan, Kan., Edwin S. McAnany, John B. Pew, and Glen A. Wisdom, all of Kansas City, Mo., and Guy O. Neal, of Anthony, Kan., on the brief), for appellee.

Before Lewis, Phillips, and Bratton, Circuit Judges.

BRATTON, *Circuit Judge:*

This is an appeal from a decree dismissing the third amended and supplemental bill in a proceeding in equity instituted by Louise McGrew Moffett, individually and as executrix of the estate of Thomas S. Moffett, deceased, against R. O. Robbins, administrator with the will annexed of the estate of John Moffett, deceased. The purpose of the bill is to restrain and enjoin the enforcement of a judgment rendered by the District Court of Harper county, Kan.

John Moffett and Thomas S. Moffett were for many years prior to 1927 equal partners in a partnership association known as Moffett Bros., which owned farm lands, livestock, and other personal property situated in Kansas, Missouri, and Oklahoma. They were also associated with their brothers Renwick J. Moffett and Joseph W. Moffett in a partnership called Moffett Bros. Cattle, Land & Lumber Company, with real and personal property situated in Oklahoma, each owning an undivided one-fourth interest therein. John Moffett, a resident of Kansas City, Mo., died testate in August, 1927, and thus the partnerships were

dissolved. Six days thereafter Thomas S. Moffett was duly appointed executor of the estate of John Moffett, deceased, by the probate court of Jackson county, Mo. He thereupon assumed to administer upon the partnership assets of Moffett Bros. in Missouri, without having given the bond required by the laws of that state, and continued to do so until his removal as executor. He caused a duly authenticated copy of the will to be filed in the probate court of Chautauqua county, Kan. Defendant was thereupon appointed ancillary administrator with the will annexed of the estate of John Moffett in Kansas, and, after the requisite bond was executed and approved, letters of administration were issued to Thomas S. Moffett as surviving partner of Moffett Bros. in that state. On November 28, 1928, the probate court of Jackson county removed Thomas S. Moffett as such executor because of an alleged conflict of interest, and on the same day the Commerce Trust Company of Kansas City was appointed executor de bonis non. It gave the additional bond required for that purpose, and on December 28th was appointed administrator for the partnership of Moffett Bros., and ever since has acted as such in Missouri. Thomas S. Moffett made final settlement, delivered substantially all of the assets of the estate then in his custody to his successor, and was discharged.

Thomas S. Moffett instituted a suit in the District Court of Harper county, which had for its purpose the partition of the lands owned by Moffett Bros. in that state. Helen Moffett, surviving widow of John Moffett, answered that the lands were purchased with money of the partnership and were used in its business; that the debts of the partnership due general creditors had been paid in full; that the partnership was indebted to the estate of John Moffett in a large amount; that Thomas S. Moffett was indebted to the partnership in a substantial sum; and that Moffett Bros. Cattle, Land & Lumber Company also was indebted to the partnership. An accounting was prayed in advance of partition in order to dtermine and adjust the respective interests of all parties The Commerce Trust Company was permitted to intervene, and it alleged substantially the same facts as those set forth in the answer of Helen Moffett. Plaintiff appealed from an

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order overruling his demurrer to the answer and from the order allowing the intervention. The Supreme Court affirmed, Moffett *v.* Moffett, 131 Kan. 582, 292 P. 947, 77 A. L. R. 294. The accounting was then ordered. Thomas S. Moffett, likewise a resident of Kansas City, Mo., died testate in December, 1930, while the action was pending and before the accounting had begun. Louise McGrew Moffett, his surviving widow and sole beneficiary, was appointed executrix of his estate in Missouri, and on January 5th, thereafter the probate court of Wyandotte County Kan., appointed Grace Torrance Clark, sister of Louise McGrew Moffett, administratrix with the will annexed of the estate. The court ordered and directed her to administer upon the estate of Moffett Bros. in Kansas. She filed an authenticated copy of the proceedings and a bond in the probate court of Chautauqua county. That court approved the bond, but subsequently revoked its action and ordered R. O. Robbins, the previously appointed ancillary administrator of the estate of John Moffett, to file a like bond and thereupon to assume administration of the partnership estate.

On the motion of Helen Moffett the action for partition was revived in the name of Louise McGrew Moffett as such sole beneficiary, and Grace Torrance Clark as such administratrix with the will annexed. The accounting proceeded and at its conclusion the court made elaborate findings of fact and conclusions of law. It was found that Moffett Bros. was indebted to the estate of John Moffett in the net sum of $142,452.24; that Moffett Bros. Cattle, Land & Lumber Company was indebted to Moffett Bros. in the sum of $101,228.06; and that the estate of Thomas S. Moffett was indebted to Moffett Bros. Cattle Land & Lumber Company in the sum of $700. Judgment was entered thereon. Defendants Louise McGrew Moffett and Grace Torrance Clark appealed. The judgment was affirmed, Clark *v.* Moffett, 136 Kan. 711, 18 P.(2d) 555. Certiorari was denied (290 U. S. 642, 54 S. Ct. 61, 78 L. Ed. 558) and motion for leave to file petition for rehearing was likewise denied, 290 U. S. 602, 54 S. Ct. 237, 78 L. Ed. 528.

This action was then filed to restrain the defendant from enforcing collection of the respective sums of $142,452.24

and $101,228.06 awarded in the judgment, it being alleged that John Moffett had no valid claim against Moffett Bros.; that the time within which a claim could be asserted in Missouri had passed; that Helen Moffett, R. O. Robbins, Commerce Trust Company, and others entered into a conspiracy to establish such a claim; that in pursuance to such conspiracy they caused Thomas S. Moffett to be removed as executor of the estate of John Moffett, deceased, by falsely averring that such a claim existed which caused a conflict of interest and therefore rendered Thomas S. Moffett disqualified to act further as such executor; that Commerce Trust Company then gave the required bond and qualified as administrator for the partnership estate before the minimum time authorized by law in Missouri had expired, in order to administer the partnership estate and defeat the right of Thomas S. Moffett as surviving partner to do so; that Commerce Trust Company then filed the fictitious claim in the probate court of Missouri, and with full knowledge that it would not be sustained there intervened in the partition suit in Kansas, making the false and fraudulent contention that the partnership was indebted to the estate of John Moffett; that in doing so it violated its fiduciary duty to the estate of Moffett Bros.; that it further violated that duty by failing to present available defenses; that defendant likewise violated his obligation to the partnership by acting in concert with Commerce Trust Company and Helen Moffett throughout the trial; that the conspirators knew that the books of account on which the alleged claim was based were unreliable and untrue, but nevertheless they introduced such books in evidence, and that the court was unaware of their unreliability; that the attorneys for the so-called conspirators held several secret interviews with the trial judge, and in one of them they discussed prior litigation to which Thomas S. Moffett was a party and which terminated unfavorably to him; that plaintiff had no knowledge of such interviews until after the judgment had been affirmed; that the judgment is void because the court lacked jurisdiction of the subject-matter and lacked power to render a judgment against Commerce Trust Company as administrator of the partnership estate in Missouri for the reason that such administrator had no assets of the

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partnership in Kansas; that Louise McGrew Moffett, as executrix of the estate of Thomas S. Moffett, was not a party to the action; that Grace Torrance Clark was a party as executrix with the will annexed of the estate of Thomas S. Moffett, deceased, but not as administering the estate of Moffett Bros.; that she was not permitted to make a defense and that there was no adversary trial; that the claim on which the judgment was founded had become barred by the statute of limitations, and that there was no substantial evidence to support such judgment. The bill contains other allegations and is replete with deductions and conclusions, but this resume of its contents will suffice.

Defendant filed a motion to dismiss which challenged the sufficiency of the bill. It was sustained, and plaintiff appealed.

[1-6] It is well settled that a final judgment rendered by a court having jurisdiction of the subject-matter and parties is conclusive upon the parties and those in privity with them in a subsequent action upon the same cause of action as to all matters in fact actually litigated or which might have been litigated therein; and such a judgment operates as an estoppel between the same parties in a subsequent proceeding upon a different cause of action only with respect to the matters actually litigated and adjudicated. That ancient rule applies even though the judgment may have been erroneous in fact or law, or both. Tait *v.* Western Maryland Ry. Co., 289 U. S. 620, 53 S. Ct. 706, 77 L. Ed. 1405; Larsen *v.* Northland Transportation Co., 292 U. S. 20, 54 S. Ct. 584, 78 L. Ed. 1096; Vinson *v.* Graham (C. C. A.) 44 F. (2d) 772; Divide Creek Irrigation Dist. *v.* Hollingsworth (C. C. A.) 72 F. (2d) 859, 96 A. L. R. 937. It is equally well settled by the decisions of this court and others that a United States court cannot vacate a judgment or decree of a state court, nor mandate that court to do so. Folk *v.* Monsell (C. C. A.) 71 F. (2d) 816. It may, however, restrain a successful litigant from enjoying the fruits of a judgment fraudulently obtained in a state court if the requisite elements of federal and equity jurisdiction exist. In doing so the court does not act in review of the judgment, nor is it concerned with irregu-

larities occurring in the proceedings in the state court. It considers the conduct of the successful party there and if it is found that he committed fraud in securing the judgment, he is prevented from enjoying its benefits. The restraint acts upon the party and does not affect the judgment. Simon *v.* Southern Ry. Co., 236 U. S. 115, 35 S. Ct. 255, 59 L. Ed. 492; Wells Fargo & Co. *v.* Taylor, 254 U. S. 175, 41 S. Ct. 93, 65 L. Ed. 205; Essanay Film Mfg. Co. *v.* Kane, 258 U. S. 358, 42 S. Ct. 318, 66 L. Ed. 658; United States *v.* Mashunkashey (C. C. A.) 72 F. (2d) 847; Murrell *v.* Stock Growers' Nat. Bank (C. C. A.) 74 F. (2d) 827; Chicago, R. I. & P. Ry. Co. *v.* Callicotte (C. C. A.) 267 F. 799, 16 A. L. R. 386. But such relief will be granted only upon fraud extrinsic to the matters tried and determined by the other court and which caused the court to render a wrong judgment, such as the successful party through fraud or deception preventing the unsuccessful from presenting his case, or from attending the trial, or where his attorney was induced to betray his client's interest, or other chicanery of that kind. The submission of perjured testimony or a fraudulent instrument on which the judgment rests is not enough, because a matter of that kind is necessarily intrinsic the proceedings. United States *v.* Throckmorton, 98 U. S. 61, 25 L. Ed. 93; Luikart *v.* Farmers' Lumber Co. (C. C. A.) 38 F. (2d) 588. In order to come within the rule, it must appear by clear allegations of fact that the party asserting it had a valid defense to the cause of action on which the judgment was rendered; that he was prevented by extrinsic fraud, accident, mistake, concealment, or other chicanery from presenting such defense, and that he had not been negligent in availing himself of it. Knox County *v.* Harshman, 133 U. S. 152, 10 S. Ct. 257, 33 L. Ed. 586; Whitcomb *v.* Shultz (C. C. A.) 223 F. 268; Jenner *v.* Murray (C. C. A.) 32 F. (2d) 625; Riverside Oil & Refining Co. *v.* Dudley (C. C. A.) 33 F. (2d) 749; Continental Nat. Bank *v.* Holland Banking Co. (C. C. A.) 66 F. (2d) 823; Wheiles *v.* Aetna Life Ins. Co. (C. C. A.) 68 F. (2d) 99.

[7] Manifestly, therefore, the allegations that Thomas S. Moffett was wrongfully removed as executor of the estate of John Moffett; that the estate of John Moffett had no

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valid claim against the partnership; that the claim was fictitiously filed in Missouri with knowledge that under the law of that state it could not be maintained there; that with such knowledge Commerce Trust Company intervened in the suit for partition and accounting in an effort to have it established there; that in doing so and in failing to advance available defenses thereto, the Trust Company violated its fiduciary duty to the partnership and that the defendant likewise violated his obligation to the partnership by co-operating with the Trust Company and Helen Moffett in the action; that the books and records upon which the claim was predicated were unreliable and untrue, and that with knowledge of that fact those advocating the claim introduced them in evidence, present intrinsic fraud because all of those facts were before the state court. Those matters were involved, thoroughly litigated, and finally adjudicated there; and the charge in the present bill that they occurred in consequence of a conspiracy does not convert them into extrinsic or collateral fraud. See Toledo Scale Co. *v.* Computing Scale Co., 261 U. S. 399, 43 S. Ct. 458, 67 L. Ed. 719.

[8, 9] The remaining charge of fraud which merits consideration relates to secret conferences between the judge of the state court and counsel in the case. The allegations are insufficient for several reasons. First, it appears from the bill that one of the alleged conferences was held in the chambers of the judge during the trial; and that while it was taking place one of counsel for Louise McGrew Moffett and Grace Torrance Clark entered the chambers, became cognizant of the fact, and made some comment with reference to it. Yet no action was taken. Instead, the trial continued without objection or protest. A party litigant may not thus sit quiescent until he has suffered an adverse decision and then raise a question of this nature for the first time. Second, it is not alleged that the decree would have been otherwise, except for the conferences; and, third, the question was raised and decided on the motion for new trial. Misconduct of the prevailing parties and passion and prejudice of the judge were among the many grounds urged for a new trial. Denial of the motion and affirmance on

appeal foreclose the question. Stress is laid upon the fact that after the trial, and before the final judgment was entered, counsel went from Kansas City, Mo., to a point in Kansas and there conferred with the judge concerning certain parts of the judgment, and that such fact was not known to plaintiff until after the judgment had been affirmed. The features discussed are not shown, and neither is it shown that the outcome of the litigation was affected by it. To the contrary, it is fairly inferable that the conference, occurred after the adverse findings of fact and conclusions of law were made on January 12, 1932, and before the entry of the judgment on March 5th, thereafter.

[10] It is contended that the judgment lacks validity because Grace Torrance Clark as administratrix of the estate of Moffett Bros. was not a party to the action. She filed the bond required by the law in Kansas and assumed to act as administratrix of the estate of the partnership. The order revived the action in her name as administratrix with the will annexed of the estate of Thomas S. Moffett, but as such administratrix administering the estate of the partnership in Kansas she filed pleadings, motions, requests for authority to defray expenses incurred in the litigation with partnership funds and reports of various kinds. She so denominated herself in such pleadings, motions, requests, and reports; she acted as such administratrix of the partnership estate and was so regarded throughout the litigation in the trial court and on appeal. The judgment was rendered against her in that capacity with no complaint that she was not a party as such. A court of equity should give meager heed to the belated contrary argument now advanced.

[11, 12] Next it is urged that under a controlling statute in Missouri, the claim against the partnership had become barred and the right thereon extinguished before it was asserted in Kansas, and that for such reason the judgment contravenes article 4 of the Constitution of the United States and the Fourteenth Amendment. Section 90, Revised Statutes of Missouri 1929 provides that claims against partnership effects shall be presented within one year after the surviving partner or executor or administrator of the estate of the deceased partner files the required bond; and

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section 60—310, Revised Statutes of Kansas 1923, provides that where a cause of action between nonresidents of that state arises in another state and under the law of such state it cannot be maintained there on account of lapse of time, it likewise cannot be maintained in Kansas. The Supreme Court of Kansas considered the question, taking both statutes into account, and determined that the claim was not barred nor the right thereon extinguished. Clark *v.* Moffett, supra. The question is one of limitation, and presents no federal right which can be reviewed here. Texas & N. O. Ry. Co. *v.* Miller, 221 U. S. 408, 31 S. Ct. 534, 55 L. Ed. 789; Wood *v.* Chesborough, 228 U. S. 672, 33 S. Ct. 706, 57 L. Ed. 1018. Moreover, that court did not deny the full faith and credit due to the law in Missouri. Instead, it observed that apparently the claim had been seasonably filed in Missouri and in Kansas, and that in addition a statute of nonclaim or limitation could not be invoked by one of the parties to bar an appropriate accounting of a partnership. We have no concern here with the correctness of that construction of the statutes. Our concern ends with the perfectly apparent fact that the court accorded full faith and credit to the law of the other state. Johnson *v.* New York Life Ins. Co., 187 U. S. 491, 23 S. Ct. 194, 47 L. Ed. 273; Pennsylvania Fire Ins. Co. *v.* Gold Issue Mining & Milling Co., 243 U. S. 93, 37 S. Ct. 344, 61 L. Ed. 610.

[13] The judgment is assailed on the further ground that there was no adversary trial Louise McGrew Moffett, as sole beneficiary of the estate of Thomas S. Moffett, Grace Torrance Clark, as administratrix with the will annexed of that estate and administering the estate of Moffett Bros. in Kansas, and all others having any interest in the estate of the partnership, were parties to the action. The purpose of the proceeding was an accounting and partition; the issues were formed and the crux of the litigation concerned itself very largely with the asserted claim that the partnership was indebted to the estate of John Moffett. Louise McGrew Moffett and Grace Torrance Clark together waged vigorous but unsuccessful opposition to that claim. Counsel who represented them were paid $3,900 from the partnership funds as compensation for their service. Grace Tor-

rance Clark made such payment. The trial consumed several days; all questions were seemingly considered thoroughly; extended findings of facts and conclusions of law were made dealing with every feature of the complicated situation; and an exhaustive judgment was entered. In these circumstances, the mere allegation that there was no adversary trial is a conclusion which the record affirmatively disproves.

[14] The contention that the judgment was not supported by evidence needs little discussion. Such a question can be determined only on appeal. It cannot be decided in an equitable action to enjoin enforcement of the judgment. Harrington *v.* Denny (D. C.) 3 F. Supp. 584; Harris *v.* Bigley, 136 Iowa, 307, 111 N. W. 432; A. B. Smith Co. *v.* Bank of Holmes County (Miss.) 18 So. 847; Nashville, C. & St. L. Ry. Co. *v.* Mattingly, 101 Ky. 219, 40 S. W. 673; Burke *v.* Wheat, 22 Kan. 722; Martin *v.* Pifer, 96 Ind. 245.

Other questions are argued, but we think they are insubstantial. For the reasons indicated, the order of dismissal is affirmed.

The opinion of the District Court, District of Kansas, Third Division, dated September 4th, 1935, in Moffett, et al., *v.* Robbins, 14 Fed. Sup. 602, is as follows:

> "Suit by Louise McGrew Moffett, executrix of the estate of Thomas S. Moffett, deceased, and another against R. O. Robbins, administrator with the will annexed of the estate of John Moffett, deceased, wherein defendant filed a motion to dismiss.
>
> "Motion allowed.
>
> "Affirmed 81 F. (2d) 431.
>
> "Martin J. O'Donnell and A. E. Watson, both of Kansas City, Mo., for plaintiffs.
>
> "Orlin A. Weede, of Kansas City, Mo., and R. O. Robbins, of Sedan, Kan., for defendant.
>
> "Hopkins, District Judge.
>
> "This suit is one to enjoin the enforcement of a judgment obtained in an accounting partition suit in the District Court of Harper county, Kan. To plaintiff's bill of complaint the defendant filed various motions, and

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the issues as now presented for determination arise on defendants' motion to dismiss. This motion had been argued orally, briefed, and duly submitted.

"It is my opinion that the matters alleged in plaintiff's "Third Amended and Supplemental Bill in Equity," together with the 'amendment,' are res judicata, and that the motion to dismiss should be sustained.

"It appears that the equity accounting partition suit (No. 7374) in Harper county was originally filed by Thomas S. Moffett, August 15, 1929. Judgments were entered from which appeals twice were taken to the Kansas Supreme Court and there affirmed. Moffett *v.* Moffett, 131 Kan. 582, 292 P. 947, 77 A. L. R. 294; Clark *v.* Moffett, 136 Kan. 711, 18 P. (2d) 555, certiorari denied 290 U. S. 602, 54 S. Ct. 227, 78 L. Ed. 528; 290 U. S. 642, 54 S. Ct. 61, 78 L. Ed. 558. It appears that all matters now complained of in the amended bill and amendments thereto were either presented in the suit in the district court of Harper county, Kan., and in the appeals, or could have been presented therein.

"(1) An examination of plaintiff's amended bill disclosed that the plaintiff Louise McGrew Moffett, as sole beneficiary of Thomas S. Moffett, deceased, was a party and filed pleadings in the suit (No. 7374) in the district court of Harper county. Therefore, the judgment rendered in such suit was finding upon her in her capacity as executrix of the Thomas S. Moffett estate. See Chicago, R. I. & Ry. Co. *v.* Schendel, 270 U. S. 611, 618, 622, 46 S. Ct. 420, 70 L. Ed. 757, 53 A. L. R. 1265. Grace Torrance Clark, administratrix with the will annexed and ancillary administratrix in Kansas of the Thomas S. Moffett estate, was also a party to the suit.

"(2) The bill states that John Moffett and Thomas S. Moffett for many years prior to the death of John Moffett on August 23, 1927, were partners in the partnership known as Moffett Bros. Thomas S. Moffett, as sole surviving partner in Kansas, administered the affairs of the partnership, and when Thomas S. Moffett died December 22, 1930, the trust as to adminis-

tering the partnership affairs fell to his estate. Churchill *v.* Buck, 102 F. 38, 44 (C. C. A. 8); State ex rel. *v.* Hubbard, 199 Mo. App. 137, 203 S. W. 250; Galbraith *v.* Tracy, 153 Ill. 54, 38 N. E. 937, 28 L. R. A. 129, 46 Am. St. Rep. 867; Dayton *v.* Bartlett, 38 Ohio St. 357; Thomson *v.* Thomson, 1 Bradf. Sur. (N. Y.) 24. The plaintiff Louise McGrew Moffett alleges that Grace Torrance Clark, on behalf of the Moffett Bros. partnership, by order of court, filed a pleading in the suit (No. 7374) in the district court of Harper county; that Grace Torrance Clark signed the petition for writ of certiorari to the United States Supreme Court as 'administratrix with the will annexed of the estate of Thomas S. Moffett, deceased, administering the estate of Moffett Brothers partnership in Kansas,' and that Louise McGrew Moffett, plaintiff herein, signed the petition for writ of certiorari as 'sole beneficiary of Thomas S. Moffett, deceased.' The allegations of the bill otherwise disclose that Grace Torrance Clark represented the Moffett Bros. partnership estate as well as the personal estate of Thomas S. Moffett, deceased, in the suit in the district court of Harper county, and on appeal that plaintiff Louise McGrew Moffett, as sole beneficiary of Thomas S. Moffett, deceased, made many requests in that suit for findings of fact and conclusions of law, and a comparison of these requests with the findings of fact and conclusions of law made by the court, which are set out in the amended bill, in my opinion, precludes any theory of fraud in connection therewith. It appears also that there were findings of fact and conclusions of law made by the court, and stated in the bill of which the plaintiff Louise McGrew Moffett made no complaint upon the trial.

"In the accounting partition suit, a decree was entered on January 13, 1932, in favor of R. O. Robbins, administrator with the will annexed of the estate of John Moffett, deceased, for $142,452.24 against Grace Torrance Clark, administratrix with the will annexed of the estate of Thomas S. Moffett, deceased, and administratrix in Kansas of the Moffett Bros. partnership estate and against the Commerce Trust Company, administrator of the Moffett Bros. partnership estate.

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Complaint is chiefly made herein by plaintiff as to this last-mentioned judgment, and it appears this judgment was the one mainly contested in the state courts. In that same suit a judgment was entered on January 13, 1932, by the district court of Harper county in favor of the Commerce Trust Company, administrator of the Moffett Bros. partnership estate for $101,228.06 against the Moffett Bros. Cattle, Land & Lumber Company partnership estate, administered by Renwick J. Moffett, sole surviving partner; and judgment was also entered in favor of the Commerce Trust Company, administrator of the Moffett Bros. partnership estate, for $16,469.53 against Grace Torrance Clark, administratrix with the will annexed of the estate of Thomas S. Moffett, deceased, Helen Moffett, widow of John Moffett, and the heirs of John Moffett were parties defendant in the suit complained of.

"All parties personally submitted to the jurisdiction of the state court and filed general pleadings in the suit. In the instant case the sole parties are the plaintiff Louise McGrew Moffett, individually and as executrix of the estate of Thomas S. Moffett, deceased, and defendant R. O. Robbins, administrator with the will annexed of the estate of John Moffett, deceased.

"This third amended bill now under consideration shows that following the rendering of the decrees complained of, January 13, 1932, only one change was thereafter made by the court, which was in term time and related to conclusion of law No. 11, which has to do with the above-mentioned decree in favor of Moffett Bros. and against the Moffett Bros. Cattle, Land & Lumber Company. This change consisted in a substitution of the domiciliary administrator for the ancillary administrator of the Moffett Bros. partnership estate in the matter of taking judgment against the Moffett Bros. Cattle, Land & Lumber Company. The bill discloses this change was made following a hearing before the court and after notice had been duly given.

"(3-7) Decisions of state courts of competent jurisdiction are binding and conclusive on all other courts

of concurrent power and are not reviewable by federal district courts of concurrent and equal competent jurisdiction. The federal district courts have no appellate jurisdiction over the decisions of state courts. Such decisions of state courts ordinarily cannot be collaterally attacked, except for fraud. Fraud which entitles a party to impeach the judgment of another court of competent jurisdiction, where jurisdiction has been acquired over the parties, as in the suit complained of, must be extrinsic to the matter tried in the other suit and not there in issue. United States *v.* Throckmorton, 98 U. S. 61, 25 L. Ed. 93. And fraud cannot be alleged by general allegations, but that facts must be stated. See Simpkins Federal Practice (Rev. Ed. 1934) par. 533, p. 507. The rule is well established that when a party has a defense which he could have interposed and was not prevented from doing so by accident, fraud, or mistake, he cannot reserve that defense to some other time or forum and thus develop a multiplicity of suits and prolong litigation. Luikart *v.* Farmers' Lumber Co., 38 F. (2d) 588 (C. C. A. 10); Smith *v.* Apple, 6 F. (2d) 559 (C. C. A. 8); United States *v.* Throckmorton, 98 U. S. 61, 25 L. Ed. 93; 43 S. Ct. 458, 67 L. Ed. 719.

"(8-9) An allegation in a bill that a judgment is not supported by evidence is a mere conclusion. That a judgment is based upon evidence supporting it must be conclusively presumed in suit to enjoin enforcement thereof. Harrington *v.* Denny et al. (D. C.) 3 F. Supp. 584.

"(10, 11) Complaint is made of an order of Judge Pollock remanding the cause complained of to the district court of Harper county, Kan. The remanding order was final and cannot be brought here indirectly for review. City of Waco, Tex., *v.* United States F. & G., 67 F. (2d) 785, 786 (C. C. A. 5). In suit complained of, Clark *v.* Moffett, 136 Kans. 711, 721, 722, 18 P. (2d) 555, the question of removal and remanding was properly passed upon in the state court.

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"(12, 13) In my opinion the bill of complaint does not contain the indispensable elements of a good cause of action. National Surety Co. *v.* State Bank, 120 F. 593, 61 L. R. A. 394 (C. C. A. 8); Knox County *v.* Harshman, 133 U. S. 152, 10 S. Ct. 257, 33 L. Ed. 586; Beals *v.* Illinois, etc., R. Co., 133 U. S. 290, 295, 10 S. Ct. 314, 33 L. Ed. 608; Walker *v.* Robbins, 55 U. S. (14 How.) 584, 586, 14 L. Ed. 552. Even if the decision of the state court were erroneous and this court might have reached a different conclusion from the evidence, there would be no violation of any federal constitutional right. Owens *v.* Battenfield, 33 F. (2d) 753 (C. C. A. 8).

"(14) Nor does the application of state statutes of limitation present a federal question. Preston *v.* Chicago, 226 U. S. 447, 33 S. Ct. 177, 57 L. Ed. 293; Wood *v.* Chesborough, 228 U. S. 672, 33 S. Ct. 706, 57 L. Ed. 1018; Gaar, Scott & Co. *v.* Shannon, 223 U. S. 468, 32 S. Ct. 236, 56 L. Ed. 510; Moran *v.* Horsky, 178 U. S. 205, 20 S. Ct. 856, 44 L. Ed. 1038. Limitation statutes of another state involve nothing more than a question of local pleading and practice. Texas & N. O. R. Co. *v.* Miller, 221 U. S. 408, 31 S. Ct. 534, 55 L. Ed. 789.

"(15) I am of the opinion the plaintiff has had her day in court and issues as presented in her bill are now res judicata. Coleman *v.* Apple, 298 F. 718, 720, 721 (C. C. A. 8); United States *v.* Throckmorton, 98 U. S. 61, 25 L. Ed. 93.

"The motion to dismiss is allowed."

A petition for writ of certiorari to review the decision of the Supreme Court of Kansas in the case of Clark *v.* Moffett, 135 Kan. 711, was filed in the United States Supreme Court on or about June 23, 1933, was docketed therein as cause No. 181, and on pages 25 to 28 thereof, both inclusive, appellants made the following Specification of Errors:

"IV

"Specification of Errors

"THE SUPREME COURT OF KANSAS ERRED:

"1. The judgments were without evidence to support them, and therefore are arbitrary and baseless, and denied to petitioners and each of them the rights guaranteed by the due process and equal protection clauses of Section 1 of the Fourteenth Amendment.

"2. Said judgment failed and refused to give full faith and credit to the public acts, records and judicial proceedings of the State of Missouri as to the statutes of non-claim and limitations and the judicial decisions of Missouri construing same, specially set up and claimed by petitioners under Section 1, Article IV of the Constitution, the protection of which petitioners invoked; and said court failed and refused to apply said Missouri law and decisions, as required by Sec. 60-310 R. S. Kan. 1923, and thereby denied petitioners the protection of the due process and equal protection clauses of the Fourteenth Amendment.

"3. In holding that the claim made against Moffett Brothers estate in favor of the estate of John Moffett was not barred by the statutes of non-claim and limitations of Missouri and Kansas.

"4. In holding that the Commerce Trust Company, as domiciliary administrator of John Moffett's estate and of Moffett Brothers partnership estate, could prosecute a claim in Kansas, which accrued to it (and was barred) in Missouri, in favor of the estate of John Moffett (a deceased partner) against the partnership estate, and in holding that the said Commerce Trust Company could, as representative of John Moffett's estate, prosecute a claim against itself as representative of Moffett Brothers estate, notwithstanding there was an ancillary administratrix of said partnership estate in court and attempting to defend against the said claim.

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"5. In affirming a judgment in favor of the ancillary administrator in Kansas of the estate of John Moffett upon an alleged claim which, if ever, accrued to the domiciliary administrator in Missouri, and was prosecuted by it against itself, and against the ancillary administratrix of the partnership estate in Kansas, notwithstanding the ancillary administrator of John Moffett's estate in Kansas did not appear in said action and present any claim against said partnership estate until the lapse of three years and five months after the administration on the partnership estate was begun in Kansas, and long after said alleged claim was barred by the Statutes of Limitations of Kansas.

"6. In holding that there was any indebtedness owing to the estate of John Moffett from Moffett Brothers partnership estate, and that there was any indebtedness owing by Thomas S. Moffett's estate to Moffett Brothers partnership estate.

"7. In holding that John Moffett, by depositing money in Moffett Brothers partnership bank account and immediately checking it out for other than partnership purposes, without knowledge or consent, or without being ratified by Thomas S. Moffett, the other partner, creates a liability upon the partnership in his favor.

"8. In holding that there was an agreement to pay interest upon yearly balances as between John Moffett and Thomas S. Moffett, sole members of Moffett Brothers, in the absence of any evidence of such an agreement.

"9. In holding that Moffett Brothers partnership estate was liable to the estate of John Moffett for interest either before or after his death and contrary to the evidence of the five witnesses testifying on the subject.

"10. In holding that Commerce Trust Company's Exhibit No. 8 was competent, and receiving same in evidence over objections.

"11. In holding that income tax returns for the years 1919 to 1923, inclusive, made to the Government, and the ruling and adjudication of the Commissioner thereon approving same, were without probative force and not binding upon the defendants and interveners, and did not constitute an estoppel.

"12. In affirming the action of the trial court in ousting the Probate Courts of Missouri and Kansas of jurisdiction and taking over to itself the administration of the estates of John Moffett, Thomas S. Moffett and Moffett Brothers partnership.

"13. In decreeing that the judgment is a lien and charge upon real estate belonging to Moffett Brothers in Missouri.

"14. In holding that it was proper to inquire into and have an accounting as between Moffett Brothers partnership estate and the Moffett Brothers Cattle, Land and Lumber Company (a separate and distinct partnership), in this proceeding.

"15. In refusing to grant petitioners' motion for a rehearing.

"16. In refusing to examine the record and determine the facts for itself, and render the judgment thereon that should have been rendered."

Petition for Writ of Certiorari to review the case of Louise McGrew Moffett *vs.* R. O. Robbins, Administrator, 81 Fed. (2d) 431, was filed in this Court on April 11, 1936, and was docketed therein as cause No. 918 and on pages 33 to 35 thereof, both inclusive, the appellants made the following Specification of Errors:

"IV

"Specification of Errors

"1. The Court of Appeals erred in affirming the decree of the lower court dismissing plaintiff's bill.

"2. The Court of Appeals erred in not reversing the decree of the lower court.

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"3. The court erred in declining to hold that Section 22-1308 R. S. Kan. 1923 (R. 10, 4-5), in so far as its provisions authorized a judgment to be rendered against a foreign administrator without any assets of the estate he represented in his possession or control in the state of the forum was unconstitutional and void, being in violation of the Fifth Amendment to the Constitution of the United States and Section 1 of the Fourteenth Amendment to the Constitution of the United States prohibiting the deprivation of property without due process of law.

"4. The court erred in holding that said provisions of said Section 22-1308 R. S. Kan. 1923 (R. 10) were constitutional and authorized the rendition of a judgment against a foreign domiciliary administrator under the conditions stated in the next preceding assignment.

"5. The court erred in holding that the alleged cause of action upon which said judgment in the district court of Harper County, Kansas, was rendered ever accrued to or vested in the respondent.

"6. The court erred in holding that said judgment of $145,133.05 (R. 8) was valid notwithstanding the Commerce Trust Company, the claimed foreign domiciliary administrator of Moffett Brothers had no property of said Moffett Brothers estate in its possession or under its control in the State of Kansas, and notwithstanding the cause of action had never been revived against Grace Torrance Clark as ancillary administratrix of Moffett Brothers in Kansas (R. 7, 8).

"7. The court erred in not holding that Section 90 R. S. Mo. 1929, together with Sec. 60-310 R. S. Kan. 1923 (R. 10) extinguished the right and remedy on the alleged claim on which the judgment herein is based, for said statute extinguished the remedy as well as the right, if any ever existed (R. 11), and the ruling of the court denied to plaintiffs the due process of law and equal protection of the laws, contrary to the prohibition contained in Section 1 of the Fourteenth Amend-

ment to the Constitution of the United States; and also said ruling failed to give full faith and credit to the public acts, records and judicial proceedings of the State of Missouri.

"8. The court erred in holding that a judgment, the enforcement and collection of which was sought to be enjoined on the grounds of collusion, conspiracy and fraud, could be set up as a complete defense thereto.

"9. The court erred in holding that the facts alleged in the bill brought the case within the general rule announced in *United States* v. *Throckmorton*, 98 U. S. 61, and was not within the exceptions to the general rule noted in said case.

"10. The court erred in holding that the acts and conduct of the respondent and his co-conspirators stated in the bill did not constitute extrinsic fraud and entitle the plaintiffs to relief, when it is conclusively shown by the bill that a fiduciary relationship existed and that respondent and its co-conspirator the Commerce Trust Company were recreant to the duties they owed petitioners in virtue of such relationship (R. 26).

"11. The court erred in holding the same representative of two different estates (individual and partnership) could prosecute a claim in favor of one (individual) and against the other (partnership) and make no defense for the partnership (R. 28).

"12. The court erred in holding that a representative of a deceased partner in Missouri could acquire the right to administer upon the partnership estate by filing a bond 24 days after its appointment as the personal representative of the deceased partner when the statute of said state required it to wait 30 days after its appointment before filing a bond to administer the partnership effects (R. 14).

"13. The court erred in holding that the plaintiffs were not entitled to the relief prayed for.

"14. The court erred in not holding that there was no adversary trial.

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"15. The court erred in holding that Grace Torrance Clark was a party to said action in the state court of Kansas (R. 224, 225) notwithstanding the case was never revived against her as the representative of the partnership estate (R. 7).

"16. The court erred in holding that petitioners were not protected by the constitutional provisions referred to in the bill."

Filed July 10, 1946. Marion Spicer, Clerk Supreme Court.

IN THE SUPREME COURT OF THE UNITED STATES

No. —

LOUISE MCGREW MOFFETT and LOUISE MCGREW MOFFETT as Executrix of the Estate of Thomas S. Moffett, Deceased, *Appellants,*

vs.

COMMERCE TRUST COMPANY, a Corporation, HELEN WEEDE, B. C. HOWARD and WILLIAM H. KOPP, *Appellees*

To the Clerk of the Supreme Court of Missouri:

ERRATUM

Since the service on July 6, 1946, upon appellants, of appellees "SUGGESTIONS OPPOSING JURISDICTION, AND MOTION TO DISMISS APPEAL OR AFFIRM JUDGMENT," we have found an error therein which we desire to correct at this time, as follows:

On page 66 of appellees' SUGGESTIONS OPPOSING JURISDICTION, etc., there appears the following:

"1. PETITION FOR AN ACCOUNTING AND PARTITION, filed by Thomas S. Moffett in the Harper County District Court (*113 to *122) both inclusive)."

This is erroneous, and should have read:

"1. PETITION FOR AN ACCOUNTING AND PARTITION filed on or about the 8th day of August, 1929, by Thomas S. Moffett, in the Circuit Court of Clay County, Missouri (*1012) (*1013 to 1022) both inclusive."

(The following numbers 2, 3, 4, 5 and 6 set forth on Said page 66 refer to documents, pleadings and proceedings in the District Court of Harper County, Kansas.)

We therefore respectfully request you to include this ERRATUM in your transcript to the Supreme Court of the United States.

JOHN T. HARDING,
DAVID A. MURPHY,
R. CARTER TUCKER,
JOHN MURPHY,
WALTER A. RAYMOND,
Attorneys for Helen Weede,
Appellee;
CHARLES M. BLACKMAR,
JAMES E. GOODRICH,
HUGH M. HILLER,
EUGENE E. BOWERS,
Attorneys for Commerce Trust Company,
Appellee;
WM. DENNIS BUSH,
Attorney for B. C. Howard,
Appellee;
GLEN A. WISDOM,
Attorney for William H. Kopp,
Appellee.

Receipt of a copy of the foregoing Erratum is hereby acknowledged, at Kansas City, Missouri, this 9th day of July, 1946.

A. E. WATSON,
MARTIN J. O'DONNELL,
Attorneys for Appellants.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1946

No. 318

LOUISE McGREW MOFFETT AND LOUISE McGREW MOFFETT AS EXECUTRIX OF THE ESTATE OF THOMAS S. MOFFETT, DECEASED,

Appellants,

vs.

COMMERCE TRUST COMPANY, A CORPORATION; HELEN WEEDE, B. C. HOWARD AND WILLIAM H. KOPP,

Appellees

MOTION OF APPELLEES TO STRIKE ALL OR CERTAIN PARTS OF APPELLANTS' DESIGNATION OF POINTS ON WHICH THEY INTEND TO RELY.

Come now the above Appellees, not intending hereby to waive or abandon in any manner their motion to dismiss or affirm the judgment of the Supreme Court of Missouri, as set forth in "Appellees' Suggestions Opposing Jurisdiction, and Motion to Dismiss Appeal or Affirm Judgment"

filed in this cause, and not intending hereby to prejudice the hearing and disposal of said motion, hereby respectfully moves the Court to strike all, or the hereinafter particularly designated portions of "Appellants' Statement and Designation under paragraph 9, Rule 13" of the points on which they intend to rely, and for a designation of the matter sought to be stricken, and for grounds of this motion, Appellees state:

1. The entire purported designation of the points on which Appellants intend to rely is vague and general, being a designation and adoption of the 37 assignments of error filed in the court below, plus two additional assignments which Appellants belatedly attempt to make in this Court; which procedure confuses the issues to be presented and defeats the purpose of the applicable rules of this Court, which is to require a clear and concise statement of the points relied upon such as will enable the Court, as well as opposing counsel, readily to perceive such points.

2. That part of said designation entitled "Assignment of Errors" (subdivided as parts I and II) should be stricken for the reason that said assignments were not filed with the Clerk of the Supreme Court of Missouri, at the time of filing of, and accompanying Appellants' petition for appeal as required by rule 9 of this Court, but such designation constitutes an attempt to add additional assignments of error after the time provided by said rule and in violation thereof.

3. The first paragraph of said designation, attempting to adopt by reference Appellants' assignment of errors, 37 in number, theretofore filed in the Supreme Court of Missouri

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under the provisions of rule 9 of this Court, should be stricken, for the reason that the number of said assignments, with the two sought to be added in the Appellants' designation, is so great that they point out nothing specific and do not constitute a clear and concise statement of material points on which Appellants intend to rely as contemplated by the rules of this Court, and if such purported points are permitted to stand there will thereby be imposed upon the Court, and upon counsel for Appellees, the burden of attempting to construe the vague and numerous assignments in violation of the purposes of the rule to place upon Appellants the duty to make so clear and concise a designation that the Court, as well as Appellees' counsel, may readily perceive what points are relied upon.

4. The entire statement of points intended to be relied upon should be stricken for the further reason that the numerous assignments of error sought to be incorporated by reference as points to be relied upon, raise many questions, some of which are *prima facie* non-Federal and as to the remainder, any substantial Federal character is denied by Appellees. The attempted designation of points as made, does not clearly and fairly apprise the Court and counsel for Appellees, of the questions which Appellants actually intend to brief and argue before this Court.

WHEREFORE, the premises considered, Appellees move the Court to strike from the records of this Court the purported designation by Appellants of the points upon which they intend to rely filed by Appellants in this Court on the — day of July, 1946, and to make and enter in this cause such orders as may be appropriate under the rules and practice of this Court for the violation of its rules regarding definite

statements of the points on which the Appellants intend to rely.

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Appellee.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1946

No. 318

LOUISE McGREW MOFFETT AND LOUISE McGREW MOFFETT AS EXECUTRIX OF THE ESTATE OF THOMAS S. MOFFETT, DECEASED,

Appellants,

vs.

COMMERCE TRUST COMPANY, A CORPORATION; HELEN WEEDE, B. C. HOWARD AND WILLIAM H. KOPP,

Appellees

SUGGESTIONS IN SUPPORT OF "MOTION OF APPELLEES TO STRIKE ALL OR CERTAIN PARTS OF APPELLANTS' DESIGNATION OF POINTS ON WHICH THEY INTEND TO RELY."

Come now Appellees and offer the following brief suggestions and authorities in support of their motion to strike all or certain portions of Appellants' designation of points to be relied upon.

Appellants filed in the Supreme Court of Missouri their Assignment of Errors, 37 in number. In the foreword to

Appellees' suggestions opposing jurisdiction, we complained of the generality and misleading effect of these numerous assignments of error. Appellants in their designation of points to be relied upon have attempted to incorporate by reference all of said 37 assignments; and to add thereto two additional assignments, after the time provided by the rules and in violation thereof. Instead of restricting the issues, as we think is clearly contemplated by the rules of this Court, Appellants have attempted to enlarge them in their designation of points to be relied upon.

We believe the observation of the Court in *Shepard* v. *U. S.*, 85 C. C. A., 160 Fed. 584, 592, pertinent here, wherein the Court said that, generally speaking:

> "Such interminable assignments, instead of impressing the court with the thought of an imperfect trial, rather cast discredit upon the worth of any of them."

The foregoing is quoted with approval in the case of *Chicago, Gt. West. Ry. Co.* v. *McDonough*, 161 Fed. 657, 659, which latter opinion was cited as authority by this Court in *Central Vermont Ry. Co.* v. *White, Administratrix*, 238 U. S. 507.

The original 37 assignments of error and the two sought to be raised out of time are so vague, general and indefinite as not to enable the Court or counsel to perceive readily the exact points intended to be relied upon. Many of the assignments clearly do not involve any Federal question and Appellees deny that there is here involved any Federal question sufficiently substantial to invoke the jurisdiction of this Court.

We believe the violation of the rules of the Court is so flagrant that this Court would, of its own motion, note the infraction and take appropriate action in regard thereto.

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However, counsel for appellees deem it their duty to the Court and to their clients, to call this matter to the attention of the Court.

In a similar situation this Court expressed itself in *Local 167 I. B. T. etc.* v. *U. S.*, 291 U. S. 293, 296, 78 L. Ed. 804, 808, as follows:

> "*In view of the omission of appellee to object* and the *lack of precedent definitely in point* we refrain from dismissing the appeal for failure substantially to comply with the statute and our rule in respect of assignment of errors. U. S. C. title 28, #862, Rule 9. But what is here said is to be understood as an announcement that *in the future a failure of that sort may be taken as sufficient ground for dismissal.*" (Emphasis added.)

We have therefore taken care to call the attention of the Court to the fact that in this case there is neither want of objection nor lack of authority for even the dismissal of the appeal. In discussing the assignment of errors in the last cited case this Court said, 291 U. S. l. c. 296, 78 L. Ed. 808:

> "While it is possible to find among them basis for the five points indicated, they contain so much that is irrelevant that they tend to confuse rather than to define the issues to be presented. They do not appropriately serve the convenience of the appellee or of the court."

We believe the above language of this Court particularly pertinent to the numerous assignments here, especially in view of the fact that Appellants are seeking to use their assignment of errors as points upon which they intend to rely.

We have found no case in which this Court has condemned the practice of designating the points to be relied upon by reference to assignments of error if the assignments so

designated as points, define the issues to be presented, and do not tend to confuse or obscure them. It is the failure of Appellants to condense and define the precise points upon which they intend to rely, which is the first basis of this motion. But the Circuit Court of Appeals, 9th Circuit, in *Peck* v. *Shell Oil Co.*, 142 F. (2d) 141, held that the attempt to supply the specifications of error required by the rules of the court, by reference to a statement of points on appeal, was in itself a violation of the rules, which are quite similar to the rule of this Court on the designation of points upon which Appellants intend to rely. The Court there said (142 F. (2) l. c. 143):

> "It should be noted at the outset that appellants have completely failed to comply with the rule 20(d) of the rules of this court in that no numbered specifications of error are included in their brief. They merely refer to a page in the printed transcript where their statement of points on appeal (filed in accordance with our rule 19) appears. Such a reference does not satisfy rule 20(d)."

In addition, in this case the designation of points is by reference to assignments of error previously made, such reference being in the designation which at the same time attempts to add further assignments of error made out of time and otherwise in violation of the rules of this Court. The designation is an attempt to piece together two separate documents and to deprive the court and opposing counsel of the clear and concise statement, in one place, of the exact points to be relied upon, to which we conceive they are entitled under the rules of this Court.

The rule of this Court here in question calling for "a definite statement of the points on which he (appellant) intends to rely" has been construed by this Court to call for "a clear and concise statement of material points on which

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plaintiff in error intends to rely." *Central Vermont Ry. Co.* v. *White*, 238 U. S. l. c. 509, 59 L. Ed. l. c. 1435.

We call attention to the following additional authorities which we believe sustain the criticism of Appellants' designation of points on which they intend to rely:

Chesapeake & D. Canal Co. v. *United States of America*, 250 U. S. 123, 124, 63 L. Ed. 889, 891;

The Phillips & Colby Construction Co. v. *Seymour*, 91 U. S. 646, 23 L. Ed. 341, 342.

We respectfully ask the Court to take such action as may be proper under the rules of the Court, in accordance with the prayer of the accompanying motion.

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No. 318.

In the Supreme Court of the United States

October Term, 1946.

LOUISE McGREW MOFFETT and LOUISE McGREW MOFFETT as Executrix of the Estate of Thomas S. Moffett, Deceased, *Appellants*,

vs.

COMMERCE TRUST COMPANY, a corporation, HELEN WEEDE, B. C. HOWARD, WILLIAM H. KOPP, *Appellees*.

Appeal from the Supreme Court of the State of Missouri.

APPELLEES' REPLY TO "RESPONSE TO 'MOTION OF APPELLEES TO STRIKE ALL OR CERTAIN PARTS OF APPELLANTS' DESIGNATION OF POINTS ON WHICH THEY INTEND TO RELY.'"

and

"APPELLANTS' REQUEST FOR A FULL HEARING ON THE MERITS."

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In the Supreme Court of the United States

October Term, 1946.

LOUISE MCGREW MOFFETT and LOUISE MCGREW MOFFETT as Executrix of the Estate of Thomas S. Moffett, Deceased, *Appellants*,

vs.

COMMERCE TRUST COMPANY, a Corporation, HELEN WEEDE, B. C. HOWARD, and WILLIAM H. KOPP, *Appellees*.

Appeal from the Supreme Court of the State of Missouri.

APPELLEES' REPLY TO "RESPONSE TO 'MOTION OF APPELLEES TO STRIKE ALL OR CERTAIN PARTS OF APPELLANTS' DESIGNATION OF POINTS ON WHICH THEY INTEND TO RELY.'"

and

"APPELLANTS' REQUEST FOR A FULL HEARING ON THE MERITS."

No. 318.

FOREWORD.

In this REPLY we have endeavored to limit our discussion to replying to the following: (1) "RESPONSE TO 'MOTION OF APPELLEES TO STRIKE ALL OR CERTAIN PARTS OF APPELLANTS' DESIGNA-

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TION OF POINTS ON WHICH THEY INTEND TO RELY' "; and (2) "APPELLANTS' REQUEST FOR A FULL HEARING ON THE MERITS," recently filed by appellants.

(Where Referred to herein, Appellants' "Response to 'Motion of Appellees to Strike All or Certain Parts of Appellants' Designation of Points on which they Intend to Rely,' and 'Appellants' Request for a Full Hearing on the Merits' " is Designated as "Response"; Appellees' Motion to Strike All or Certain Parts of Appellants' Statement of Points on which they Intend to Rely, is designated as "Motion"; and Appellants' Brief Opposing Motion to Dismiss or Affirm in accordance with Paragraph 3, Rule 7, is Designated as "Appellants' Brief"; Appellees' Statement Opposing Jurisdiction and Motion to Dismiss or Affirm is Designated herein as "Statement Opposing Jurisdiction.")

I.

This appeal should be dismissed for want of jurisdiction.

The appellees have no power to confer jurisdiction of the appeal on this court, by consent or waiver, and in their Motion (pp. 1, 2) have expressly disclaimed any intention of so doing. Appellants include within their Response a request for permission to present the cause "on its full merits" by brief and oral argument. Their theory is that what they allege to be the subject matter of the controversy is (assertedly) inherently federal (Response, pp. 7, 8, 16-19), and therefore this court may not dismiss the appeal; and that appellees, by the extent of their statement opposing jurisdiction and by the filing of their said motion, in effect have abandoned their claim that this court has no jurisdiction of the appeal, and have

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requested the opportunity to file briefs and to be heard orally on the full case (Response, pp. 8, 9).

The contention that the subject matter of the controversy herein is inherently federal cannot be made except by attempting to patch together several insupportable assumptions having no logical connection with each other. As they are presented in Appellants' Response, these argumentative assumptions (except B below), are only an attempt to rediscuss points covered in their Jurisdictional Statement and Appellants' Brief (cf. said Brief, pp. 30, 31, 48, 49-51, 57, 60, 70-71, 76-78, 92-93), and on which they have no right to be heard again in this court and at this time. Gathering together from here and there in said Response and Appellants' Brief, the component parts of the argument that the subject matter in controversy herein is inherently federal, so as to prevent dismissal for want of a substantial claim to support jurisdiction, we find them as follows:

Appellants' claim as to jurisdiction.

A. Sec. 948, R. S. Mo. 1939, bars any further action, and thus completely forecloses appellants' assertion of their alleged federally-sponsored rights (Response, p. 7, Appellants' Brief, pp. 49, 87, 88).

B. Sec. 652, R. S. Mo. 1939, and R. S. U. S., Sec. 1 (Sec. 1, Title 1, U. S. Code), and the Civil Rights Statutes, R. S. U. S., Secs. 1979, 1980, 1981 (Secs. 43, 47, 48, Title 8, U. S. Code) must be taken together and as one law, under which both appellants now assert they were authorized to sue jointly by and under the Civil Rights Statutes (Response, pp. 16, 18, 19; Appellants' Brief, pp. 30, 31, 32, 59, 61-72).

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This claim B not timely made or preserved for review.

With respect to B above, which raises a very important point as to the issue of jurisdiction or none, we submit that in the first place, this contention was "born out of due time" and was first suggested to the appellants by Point II of Appellees' Statement Opposing Jurisdiction (pp. 22-30, as printed), and taken up by Appellants' Brief, p. 30. Appellants now attempt, improperly, in their statement and designation under paragraph 9, Rule 13, to inject an untimely assignment of error and designate a point unsupported by the record, by asserting their right to sue *jointly* as a part of that afforded them by the Civil Rights Statutes. That contention is not properly before this court and furnishes one of the reasons why our motion should be sustained. We submit that none of the 37 assignments of error, filed with the clerk of the Supreme Court of Missouri, raises the contention that the right to sue *jointly* in this case was afforded appellants by the Civil Rights Statutes.

However, since we would have no other immediate opportunity in the event of a determination by this court adversely to our position, we shall, in proper order, discuss that question herein for the present purpose.

C. That, in addition to denying appellants alleged federal rights by holding Sec. 948, R. S. Mo. 1939, constitutional, the Supreme Court of Missouri held that the Fifth Amended (and Third insufficient) Petition did not state a cause of action, in spite of its disavowal of so holding, thus denying appellants alleged federal rights claimed under the assignments of error held by the court not to be germane to the question whether said petition misjoined plaintiffs or failed to state a joint cause of action; and therefore the case cannot pass off on the then appli-

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cable state law as to misjoinder, before reaching an inherently federal question. (Response, pp. 13, 14, 15, 17; Appellants' Brief, pp. 4, 5, 6, 7, 76.)

Appellants' claim A refuted.

We have already answered A above. Section 948, R. S. Mo. 1939, authorized no judgment which would bar a future action on the same facts, and the judgment rendered was proper thereunder. (Statement Opposing Jurisdiction, pp. 18, 19, 20.)

Appellants' claim B refuted.

With respect to B above, Sec. 652, R. S. Mo. 1939, must be read with Sec. 653 *id.*, and giving them the same legal effect as R. S. U. S., Sec. 1, that whether the singular shall be construed to include the plural must be determined by the evident intent of the statute, taking into consideration its context and the subject matter dealt with.

Sec. 653, R. S. Mo. 1939, provides that the rule of Sec. 652 shall apply "unless it be otherwise specially provided, or unless there be something in the subject or context repugnant to such construction." Clearly, there was "something in the subject" of both the state and federal statutes repugnant to the construction appellants demand. At all times in question both Missouri and the U. S. had independent codes of civil procedure regulating the joinder of parties to actions. Where either state or nation has seen fit in remedial statutes to take cognizance of civil procedure, they have engrafted upon the remedial act a variation from the general rules of procedure. (Statement Opposing Jurisdiction, pp. 24, 26.)

For an instance in Missouri, we note the wrongful Death Statute, designating who may sue. *Cummins* v. *K. C. Public Service Co.*, 334 Mo. 672, l. c. 679, 681, 66 S. W.

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(2d) 920. *Barr* v. *U. S.*, 324 U. S. 83 (Response, p. 18), followed a definite purpose of Congress implicit in the statute to which Sec. 1, R. S. U. S. was applied. It did not attempt to interpolate into the statute an unrelated problem of procedure. The Missouri Supreme Court refused to apply what are now Sections 652, 653, R. S. Mo. 1939, so as to make the Statute of Descents read *wives* and *husbands* of an intestate, *Russell* v. *Nelson*, 317 Mo. 148, l. c. 153, 154; and this court refused to apply Sec. 1, R. S. U. S., so as to authorize branches of a National Bank in Missouri, contrary to local law, holding that the rule as to construing singular to include plural under Sec. 1 *id.* "*obviously* * * * is not one to be applied except where it is *necessary* to carry out the evident intent of the statute" (emphasis added). *First Nat'l Bank* v. *Missouri*, 263 U. S. 640, l. c. 657, 68 L. Ed. 486, l. c. 493. In R. S. U. S., Sec. 1, it is provided that words importing the singular number *may* extend and be applied to several persons or things" unless the context shows that such words were intended to be used in a more limited sense." R. S. U. S., Secs. 1979, 1980 and 1981, are from the Act of April 20, 1871, c. 22, Secs. 1, 2 and 6, respectively, and are *in pari materia*. All deal with aspects of deprivation of civil rights. Sec. 1981 *id.* provides that if death of any party be caused by any such wrong, the *legal representatives* of deceased may recover damages

> "for the benefit of the widow of the deceased, if there be one, and if there be no widow, then for the benefit of the next of kin of the deceased."

Thus the context of Sec. 1981 *id.* shows that the word "person" therein definitely could not include both the legal representative and the widow of the deceased.

The Supreme Court of Missouri has *never* construed

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Secs. 652, 653, R. S. Mo. 1939, as affecting the Code of Civil Procedure on joinder of parties (Statement Opposing Jurisdiction, pp. 23, 26, 27, 29, 30); nor have appellants been able to show that this court has ever made such application of Sec. 1, R. S. U. S., as they seek (Response, pp. 16, 18; Appellants' Brief, pp. 30, 31, 70, 71). They present cases (Response, p. 16) brought in a *U. S. District Court* and governed by the applicable provisions of the Federal Civil Code, permitting joinder (see Rules 20, 21), and *Georgia* v. *Penna. R. Co.*, an original proceeding in this Court, wherein a state sues as quasi-sovereign and protector of its people against a continuing wrong, and to redress wrongs done the state as owner of property and institutions. They also have had recourse to decisions in *class suits in equity*. The alleged accumulated woes of Mrs. Moffett have not transformed her into a class. This is, furthermore, an action at law, not in equity.

There is another insurmountable obstacle to the contention thus made by appellants. In this petition (154-323, using reference in Response, presumably transcript paging) the executrix of the estate of Thomas S. Moffett, deceased (in course of administration) is one party and Louise McGrew Moffett, individually, is the other party, claiming as ultimate sole devisee and distributee of said estate, upon the settlement and distribution thereof, as well as alleged joint owner of property with her deceased husband. The allegation of joint ownership by Mrs. Moffett and her husband was a mere conclusion of law, contradicted by numerous allegations in the petition as the Supreme Court of Missouri held (193 S. W. (2d), l. c. 590) (821, 822). The many allegations of the petition that the individual appellant derived her interest as sole devisee of her husband contradicted and destroyed the allegation as to joint ownership. Conflicting allegations import false-

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hood and inconsistency does not help the pleader. *Losch* v. *Pickett*, 36 Kans., l. c. 222; *Koewing* v. *Bldg. & Loan Ass'n*, 327 Mo. 680, l. c. 689, 38 S. W. (2d) 40.

The alleged interests of the respective appellants herein as present executrix and prospective distributee of the estate are not concurrent but consecutive. The claim against Commerce Trust Company, an appellee herein, with respect to alleged appropriation of part of the Moffett Brothers partnership estate (246 *id.*), of which said Trust Company is administrator, is not one of which the circuit courts of Missouri have cognizance. *Smith* v. *Trust Co.*, 340 Mo. 979, 104 S. W. (2d) 341; *Odom* v. *Langston*, 351 Mo. 609, 173 S. W. (2d) 826; *Wass* v. *Hammontree*, 77 S. W. (2d) 1006, l. c. 1010.

Distributee cannot "by-pass" pending administration.

Title to choses in action and the right to sue thereon are in the personal representative, and heirs or distributees have no right of action either at law or in equity, unless and until they receive the estate in course of administration. Heirs or devisees cannot "by-pass" a pending administration. *Odom* v. *Langston; Wass* v. *Hammontree, supra; Smith* v. *St. L. Union Trust Co.*, 340 Mo. 979, l. c. 984, 104 S. W. (2d) 341; *Bristow* v. *Gage*, 280 U. S. 328, l. c. 334. The executrix appellant could not join a cause of action which she may have, in her individual capacity, with that asserted in the representative capacity. *Mertens* v. *Lowenberg*, 69 Mo. 209; *Niederberg* v. *Golluber*, (Mo.) 162 S. W. (2d) 592, l. c. 599, wherein a widower sued in equity, in his individual capacity and as administrator of his wife's estate. The Niederberg case emphasizes the construction which the Supreme Court of Missouri has also placed upon Sec. 851, R. S. Mo. 1939, cited in Appellants' Brief, p. 80, that all persons must have a

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legal interest in subject matter and relief, who may join as plaintiffs. The court held that the plaintiffs, respectively administrator of the deceased wife's estate and as widower, are not united in interest in their claim for rental value of alleged trust real estate under Sec. 853 *id.*, nor both necessary parties to complete determination of the question involved under Sec. 852 *id.*,

> "nor are both plaintiffs (legally) interested in the subject matter, and in obtaining the relief demanded so as to be properly joined as plaintiffs under Sec. 851, R. S. 1939 Mo."

Kansas statutes do not aid appellants.

Sec. 850 *id.* is the familiar code provision authorizing a personal representative, trustee of an express trust or a person expressly authorized by statute to sue in his own name without joining with him the beneficiary and making "trustee of an express trust" include a party to a contract for benefit of another. Claiming causes of action allegedly arising in *Kansas,* appellants cite Secs. 856-858, R. S. Mo. 1939 (Statement as to Jurisdiction, p. 17), Assignment of Error 24, and quote *Hotchkiss* v. *Ogle,* 153 Kans. 156, l. c. 162 (Appellants' Brief, p. 79), with the comment that the two Kansas Code sections therein mentioned duplicate Secs. 850 and 851, R. S. Mo. 1939. They carefully omit mentioning that the principal object in the Hotchkiss case was *foreclosure of a real estate mortgage;* and that Sec. 60-601, G. S. Kans. 1935, provides that *foreclosures* of mortgages or other liens are an *exception* to the *requirement* that the causes of action united *must affect all parties* to the action.

In *Leinbach* v. *Dyatt,* 112 Kans. 82, l. c. 788, it was held that:

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> "But the rule that only those causes can be joined which affect all the parties does not apply in actions to enforce mortgages or other liens."

Appellants concede the fallacy of their position in joinder when they seek support from foreign authorities which are equally against them. In *Gray* v. *Blight*, (C. C. A.) 112 Fed. (2d) 696, l. c. 698, it is well held that:

> "The law of the jurisdiction by which relief is sought controls as to all matters pertaining to remedial, as distinguished from substantive, rights."

Certiorari thereon was denied 311 U. S. 706. In *Kansas* v. *U. S. F. & G. Co.*, 328 Mo. 295, 40 S. W. (2d) 1050, l. c. 1052, the Supreme Court of Missouri correctly held:

> "The manner of bringing a suit, as in this case, whether properly brought in the name of the obligee named in the bond, or the real party in interest, pertains to the form of remedy * * *. It is therefore controlled by the *lex fori*. Such is the uniform ruling of the various courts."

In *National Mutual Casualty Co.* v. *Blackford*, (Ark.) 141 S. W. (2d) 54, l. c. 56, it is held:

> "Furthermore, we think the right to join the insurer in this case is governed by the law of the forum. It relates to the remedy and is a procedural matter, not one of substance."

In *Hanger* v. *Abbott*, 6 Wallace (73 U. S.) 532, 18 L. Ed. 939, this court said :

> "Proceedings in courts of justice are usually determined by the *lex fori* of the place where the suit is pending * * *."

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Appellees also refer to our Statement Opposing Jurisdiction, II, pages 22-30, as printed.

We submit that under the above cited controlling decisions of this court and of the Supreme Court of Missouri, the belated contention of appellants, that R. S. U. S., Secs. 1979, 1980 and 1981, conferred upon the distinct appellants herein the right to bring and maintain this suit jointly for alleged deprivation of civil rights, is groundless, without substance of color; that it was not timely made; and that the right of joinder must be determined by the law of the forum in which the action under such civil rights statutes is brought, and that the Supreme Court of Missouri correctly declared and applied that law in the instant case. While we regret the length of this presentation, appellants compelled it, by the nature of the Response, pp. 16, 18, 19, and this discussion was vitally necessary to the following discussion of the contention C of appellants as first herein outlined, which next follows.

Appellants' claim C refuted.

Under contention C of appellants as first herein outlined, they assert a federal question in that it is claimed the validity of Sec. 948, R. S. Mo. 1939, as violative of federal law, is drawn in question in the record and that the statute was upheld and that the validity of U. S. R. S., Secs. 1979, 1980 and 1981 was drawn in question by the demurrers of the appellees, and that the opinion of the Supreme Court held said civil rights statutes invalid (Response, pp. 6, 7 and 8). In the endeavor to escape the clear net result that the case was decided on the applicable local rule of practice then in force by dismissal of the Petition for Misjoinder of Plaintiffs with right to bring any other action, and without the involvement of any substantial or colorable federal question, appellants

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must and do make the unfounded contentions that the challenged judgment (a) was final and on the merits, (b) disposed of the case without giving appellants the "hearing" required by law, and (c) denied appellants, not the right to sue under the civil rights statutes, which they claim in the record, but what they now erroneously conceive and belatedly attempt to claim as their right under the civil rights act, to bring and maintain the instant case *jointly* thereunder.

The contentions as to Sec. 948, R. S. Mo. 1939, such as they were, were the only ones having a pretense of constitutional character decided by the Missouri Supreme Court (193 S. W. (2d), l. c. 592, Syll. 10) (826). In Appellants' Brief, p. 48, they practically abandon their contentions as to unconstitutionality of Sec. 948 *id.*, and make it clear that they are now attacking the *application* of this section by the courts, which is not an attack upon its validity at all, and that in their charge as to "penalty" they have no reference to the treble costs provided for by said section. They say (said Brief, p. 48):

> "the manner of its application made Section 948 a mere bill of attainder, and such circumstances contradict the recital in the opinion of the State Supreme Court that said statute was a statute which 'inflicts no penalty without a hearing' (826).
>
> "It may be that, in the abstract, the statute meant just that, but, as applied herein, it inflicted the penalty provided in it without any hearing or opportunity to appellants to be heard. It was this unlawful application of said Section 948 that frustrated the power of either the Circuit Court or the Supreme Court to give appellants any relief under R. S. U. S., 1979, 1980 and 1981, or to award any damages for the deprivation of all the constitutional rights referred to in the record herein, and was the basis of the unlawful denial by the state court of said federal rights."

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The above frankly concedes that it is not Section 948 *id.* as passed by the Missouri Legislature to which appellants have reference. Section 10, Article I of the U. S. Constitution forbids legislative enactment of a bill of attainder. All appellants charge, and groundlessly, is that the trial court failed to carry out the command of the statute by affording a "hearing." Appellants had three complaints as to the matter of hearing: (a) because they contend that the trial court should have determined the correctness of the rulings by other judges on demurrers to previous petitions. The question was not before the trial court and was not preserved in the Supreme Court for the reasons stated in its opinion (193 S. W. (2d), l. c. 591, 592) (824, 825); (b) because the circuit court denied appellants' request for additional time for preparation for argument of the demurrers, under circumstances fully set out in the opinion of the Supreme Court and which justify the action of the trial court (193 S. W. (2d), l. c. 591, Syll. 4) (823, 824), and (c) apparently because the trial court denied their suggestion that the court below hear further presentation *as to whether the Petition stated a cause of action in favor of either plaintiff* (421 Printed Record, Mo. Sup. Ct.; Appellants' Statement as to Jurisdiction, pp. 24, 25). *The trial court had indicated that it had had briefs and argument on the question of misjoinder of plaintiffs and had determined that issue to be so decisive of the case that further briefs and argument would be futile* (421 *id.*, Appellants' Brief, pp. 37, 38).

In Appellants' Brief on page 33 and at the top of page 36 are repeated quotations of a purported recital on page 406 of the Record as printed in the Missouri Supreme Court, reciting that without evidence, notice, hearing or jurisdiction, the circuit court entered the challenged judgment of dismissal. The mentioned paragraph is obviously

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an interpolation by counsel who prepared the record. No court ever stultified itself by authorizing a record of its proceedings to be made, showing that the court was proceeding to enter a judgment without hearing evidence or arguments, and in the absence of notice and jurisdiction to act. Following a procedure authorized by *Yellow Mfg. Acceptance Corp.* v. *American Taxicabs*, 340 Mo. 1200, 130 S. W. (2d) 601, respondents before the Missouri Supreme Court, the appellees here, on or about November 9, 1945 (R. ....), moved to strike the above mentioned paragraph and other recitals of the alleged record on the grounds that same were not true copies of the record and were misleading, argumentative and not in proper form to go into the record, relying upon the American Taxicabs case as authority for such action. The Supreme Court took such motion and a counter motion with the case on the merits (see order made December 3, 1945, R. ....), and in effect upheld present appellees' motion by ruling that the challenged judgment "is correct in form and in accordance with law" (193 S. W. (2d), l. c. 592) (827). No such result could have been reached if that court had considered the interpolation in the record as to lack of evidence, notice, hearing or jurisdiction as a legitimate part of the record in the case.

We have abundantly answered the contentions made in Appellants' Brief, pp. 49, 87, that the challenged judgment was on the merits or a bar to another action (Statement Opposing Jurisdiction, pp. 18, 19). Despite what appellants now say (Response, p. 7) that the *validity* of Sec. 948, R. S. Mo. 1939, was drawn in question, Appellants' Brief at page 48 concedes the validity of that section and, on pages 32, 43, 45, 48, 49 and 51 by continuous reiteration, makes it clear that their real contention is that they were wronged, not by the act of the legislature

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in passing that section, but by the procedure of the courts in applying it. Bearing in mind that when the third defective pleading has been adjudged insufficient, the provisions of that section are "mandatory, leaving no discretion to be exercised by the trial court." *Gordon* v. *Burris*, 125 Mo. 39, l. c. 42, 183 S. W. 191; see also *Beardsley* v. *Morganer*, 73 Mo. 22, it is demonstrated above that appellants were afforded all of the hearing and opportunity for hearing to which they were entitled or which the circumstances of the case made possible; and that as to Sec. 948 *id.*, appellants were not deprived of any relief to which they might have made claim or been entitled under R. S. U. S., Secs. 1979, 1980 and 1981. This is because, as shown above, (a) said civil rights statutes did not confer upon appellants the right to maintain the action jointly; (b) appellants never made any claim of a federal question by reason of an asserted right to maintain their suit *jointly* under the federal rights statutes, in any court or at any time until their posthumous attempt to drag that question into this court by (Appellants' Statement and Designation under Paragraph 9, Rule 13) a point on which they hope to rely, wherein they attempt to assign as error the denial of the alleged right to sue *jointly* under the civil rights statutes, which they had never before asserted, and (c) because the challenged judgment left them free to prosecute any other action on the alleged facts in proper time and form. Thus, any alleged federal question as to Sec. 948 *id.*, besides being unsubstantial and frivolous, has never been preserved for review in this court.

We cannot take leave of Sec. 948 without mentioning the unwarranted aspersions cast upon Trial Judge Ridge by Appellants' Statement as to Jurisdiction, pp. 19 and 20, and in Appellants' Brief, p. 49, top. The court found

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"upon the record" that a third petition of appellants herein had been found insufficient. The suggestions of counsel for the appellees mentioned in the statement as to jurisdiction, pp. 19 and 20, and in Appellants' Brief, pp. 42, 44, were to invite the judicial notice of the court to the rulings on the previous petitions. Those who seek judicial notice must suggest and invite it. *Shapleigh* v. *Mier*, 299 U. S. 468, 81 L. Ed. 355, 57 S. Ct. 261.

As to the statement at top of page 49 of Appellants' Brief, in effect a charge that Trial Judge Ridge by the declaration, "I will just overrule the other grounds of the demurrer" (p. 422, Printed Record, Mo. Supreme Court), indicated he had concluded the petition stated a cause of action under the civil rights statutes. We pointed out above that appellants' counsel (421 *id.*), just previous to that statement, had made the declaration that *the court, not having considered* whether the petition *stated a cause of action*, should hear further presentation of that question *in order to determine it*. This court judicially knows that Judge Ridge has since become a judge of the District Court of the United States for the Western District of Missouri. That the court had determined there was a misjoinder of plaintiffs was sufficient. Appellants' counsel themselves solemnly in open court declared that his conclusions had gone no further (p. 422 *id.*).

Appellants claim (Response, p. 14) that the opinion of the Supreme Court of Missouri (193 S. W. (2d) 588, *et seq.*) (827) by recital "appellants have not been denied due process. They have not only had their day in court, but their months and years," decided "that the only question in the case which constitutes the federal basis of the cause of action does not exist and hence that the pleading does not state a cause of action" (Response, p. 14). Thus they say farewell to their attack upon Sec. 948, R. S. Mo.

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1939; and admit that their alleged inherently federal subject of controversy (p. 8, *id.*) is the denial of rights alleged to be claimed under the *civil rights* statutes. The asserted federal basis is further amplified by the recitals (Response, p. 7, top) that the jurisdictional statement and record disclosed that the validity of U. S. R. S., Secs. 1979, 1980 and 1981, was drawn in question by appellees' demurrers, and that the judgment of the Missouri Supreme Court is, so appellants asserted, a general holding that their Fifth Amended Petition failed to state a cause of action and consequently held said acts of Congress invalid under *U. S.* v. *Sutton,* 215 U. S. 291, 54 L. Ed. 200. That case was before this court on error to a District Court of the United States in a criminal case, to review the sustaining by the trial court of a demurrer to an indictment founded on the Act of January 30, 1897, making it a crime to introduce intoxicating liquors into the Indian country. Since such Act was the basis of the indictment it was properly held that the question whether the indictment charged offense against the United States laws, involved the validity of the Act of January 30, 1897, *as applied where the stated facts were agreed upon;* wherefore, the case was properly before this court under the statute on writs of error in criminal cases.

In connection with the charge that the validity of the civil rights statutes was drawn in question by the demurrers, appellants say (Response, p. 14) that appellees admit the allegations of the petition specifically disclosing that Mrs. Moffett was not accorded due process in the Kansas litigation by the Kansas judge, nor by the Missouri court under color of state laws, in denying *Mrs. Moffett's* attempt to be relieved from the pendency of certain alleged "fictitious" suits for 16 years. This apparently simple statement is elusive and deceptive. Mrs.

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Moffett appears in this case in two capacities, that of widow of her deceased husband and also that of executrix of his estate. Their separate entities and rights are as distinct for legal purposes as if the administration of said estate were in the hands of a corporate fiduciary, representing the creditors of the estate as well as ultimate distributees thereof. Since we will show that this case passed off entirely on the issue of misjoinder of plaintiffs and that same involved no federal question, it is not material as to what allegations of a petition are admitted by demurrer under Missouri law.

Demurrers admitted only well-pleaded ultimate facts.

But to show the fallacy of the argument and the complete lack of relevancy of the question of "admissions," we may say that under Missouri law a demurrer admits only the well-pleaded, ultimate, constitutive, issuable facts, and these do not include statements by the pleader as to foreign law, though in the form of a statement of fact. In *Bushman* v. *Barlow*, 321 Mo. 1052, 15 S. W. (2d) 329, it is held (l. c. 1059, Official Report) that

> "The rule is that only such facts are admitted by a demurrer as are well pleaded."

In *Stonemets* v. *Head*, 248 Mo. 243, l. c. 254, the Supreme Court held:

> "Defendant is entitled to the rule that while his demurrer admits the truth of averments of substantive fact, it does not admit facts not well pleaded, or impossible or absurd averments, or the soundness of mere conclusions of law, or the mere conclusions of the pleader upon the facts constitutive of his cause of action, or mere argumentative matter."

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And in *Odom* v. *Langston*, 351 Mo. 609, l. c. 621, 173 S. W. (2d) 826, held that

> " • • • a demurrer does not admit evidentiary facts or conclusions of law, but only utimate constitutive facts which are well pleaded in the suit on trial. *Hughes* v. *State Board of Health*, 345 Mo. 995, 998 (2), 137 S. W. (2d) 523, 525 (4, 5)."

In *Finney* v. *Guy*, 189 U. S. 335, l. c. 344, 47 L. Ed. 839, l. c. 845, this court held:

> "The courts are not concluded by an averment of what is the law in a foreign jurisdiction, contained in a pleading which is demurred to, any more than they would be by the testimony of a witness to the same effect upon a trial; certainly not when the statute upon which the case rests is set forth and the decisions under it are also referred to as to evidence of the law. The demurrer does not admit as a fact that the construction (in the form of an averment of fact) which the pleader may choose to put upon those statutes or decisions is the right construction to be drawn from them."

Sec. 948, R. S. Mo. 1939, reads:

> "In every action or proceeding wherein the law of another state of the United States of America is pleaded, the courts of this state shall take judicial notice of the public statutes and judicial decisions of said state."

That statute imposes upon the Missouri courts the duty of taking judicial notice, not only of the statute and such decisions as the pleader may choose to set out, but of *all* judicial decisions, of the foreign state, interpreting or construing the statute in question. *Corbett* v. *Terminal R. Ass'n*, 336 Mo. 972, l. c. 980, 82 S. W. (2d) 97. The petition

ruled on herein pleads a multitude of statutes and court decisions of the state of Kansas (Statement Opposing Jurisdiction, p. 73).

Aside from the frivolous and nonsubstantial contentions as to Sec. 948, R. S. Mo. 1939, it was unnecessary for the Supreme Court of Missouri to look beyond the challenged petition to determine the issue of misjoinder of plaintiffs, which was the sole, sufficient and absolutely non-Federal ground upon which it disposed of the case. However, if that court had found it necessary to decide the *other* assignments it had the right, as had the trial court, to consider the opinions and exhibits attached to Appellees' Statement Opposing Jurisdiction (Tr. 1050, 1062), printed pages 110-151. See Statement Opposing Jurisdiction, VII, Judicial Notice 71-78.

No jurisdition in this court.

The answers to the contention by appellants as to alleged jurisdiction of this court are so many and so conclusive that they can be stated briefly.

1. The validity of the U. S. R. S., Secs. 1979, 1980 and 1981, was not drawn in question by the demurrers, which as demonstrated above did not admit the conclusions stated in the Petition that appellants had been denied due process in the Kansas or Missouri courts. In the *U. S.* v. *Sutton, supra,* stating the rule on which appellants rely (Response, p. 7), the validity of the statute defining the offense was held involved in the issue on demurrer because all material facts, including the denounced introduction of intoxicants into the Indian country, were admitted by an agreed statement of facts.

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Validity of Federal Civil Rights Statutes not denied.

2. Furthermore, the point of misjoinder of plaintiffs raised by the demurrers did not and could not involve any decision against the validity of said Federal Civil Rights Statutes, and this was the sole ground of demurrer acted upon by both Circuit and Supreme Courts of the state. As we have shown above, the attempt of appellants to interpret said statutes so as to give an executrix and a devisee, like appellants, the right to sue jointly, as in this action, has signally failed and their belated attempt to rely on such statutes as giving that right, and to maintain that they made a record of and preserved throughout the case their claim to that right, is abortive, belated and futile. The claim of rights, under said U. S. R. S., Secs. 1979, 1980 and 1981, as made in appellants' statement as to jurisdiction or jurisdictional statement under "How Federal Questions Were Raised," pages 5, 10, 11 and 16, printed, shows definitely that their claim was to such rights as said statute sections gave and secured to them. We have demonstrated above that R. S. U. S., Sec. 1, Sec. 952, and Sections 856, 857 and 858, R. S. Mo. 1939 (the latter three sections accrued under the laws of another state, if authorized by such law to bring the action, and if not, those empowered by the laws of such state to sue for the beneficiaries, to maintain action in Missouri), cannot have the effect of making the right to maintain this action *jointly*, one which is given or protected by the Federal Civil Rights Statutes. (See Assignment of Error 24.) The cases cited as holding to the contrary by counsel for appellants in their printed Statement as to Jurisdiction, pages 35, 36, such as *Young* v. *Boatmen's Bank*, 350 Mo. 1157, 171 S. W. (2d) 552, and others, were either cases in which the question of misjoinder was not timely raised, or, as in *Kammeyer* v. *Concordia*, 352 Mo. 742 (34 *id.*),

were class suits in equity, or for other reasons are not authorities. *Armour* v. *Roberts*, 151 Fed. 846 (35 *id.*), cited as a decision by the Circuit Court of Appeals of the Eighth Circuit, was, as opposing counsel well know, decided by an Iowa judge sitting in the Federal District Court, who was excusably ill versed in Missouri practice. Appellants first tardily endeavored to raise a right of joinder claim to ground the jurisdiction of this court, in that part of "Appellants' Statement and Designation under Paragraph 9, Rule 13," entitled "Assignment of Errors," by attempting to make a claim and assign error on the contention that the Federal Civil Rights Statutes gave them the right to maintain this action *jointly*. The alleged error should have been pointed out in the Assignment of Errors filed in the Supreme Court of Missouri, and this claim was properly attacked by Appellees' Motion. This court, in *Flournoy* v. *Wiener*, 321 U. S. 253, l. c. 259, 88 L. Ed. 708, l. c. 731, said:

> "It is a familiar rule, consistently followed, that upon appeal from a state court this Court will not pass upon or consider Federal questions not assigned as error or designated in the point to be relied upon even though properly presented to and passed upon by the state court." (Citing many authorities.)

The alleged Federal question of right to sue jointly under the Federal Civil Rights Statutes is not properly before this court. It cannot be considered here.

3. The Supreme Court of Missouri decided this case on the sole ground of misjoinder of plaintiffs, one of state practice entirely, when it said (193 S. W. (2d), l. c. 591 (823, 824):

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> "Judge Ridge sustained the demurrers on the sole ground of misjoinder of parties, * * *. We think the reason assigned by the trial court is sufficient, * * *,"

and added, after making the obiter remark cited by appellants (Response, p. 14), at page 592 (827):

> "None of these assignments is germane to the question whether the Fifth Amended Petition contains a misjoinder of parties plaintiff or fails to state a joint cause of action."

As said by this court in *Parker* v. *McLain*, 237 U. S. 469, 59 L. Ed. 1010-1051, this "was purely a question of local law or practice, and the decision by the Supreme Court of the state is controlling"; and in *Johnson* v. *Drew*, 171 U. S. 93, 43 L. Ed. 88, it was held, as here:

> "The substantial rights of the defendant were not prejudiced, and the ruling involved merely a question of state practice."

The decision of the Missouri Supreme Court had been reached on the point of misjoinder before it even mentioned the assignments of error involving alleged constitutional rights (not pertaining to Sec. 948, R. S. Mo. 1939). The remarks of the court which appellants say (Response, pp. 14, 15) imported a decision upon Federal questions and denial of Federal rights, could not have that effect, since they were *obiter dicta*, and it would be impossible to base *stare decisis* thereon. As said by the Supreme Court of Missouri in *State ex rel. Robb* v. *Shain*, 347 Mo. 928, l. c. 931, and well applicable to the remarks here complained of, the matter is "obiter dictum, because the court had no such situation before it." And in *Humphrey's Exr.* v. *U. S.*, 295 U. S. 602, l. c. 626, 79 L. Ed. 1611, l. c. 1618, this court held:

> "In the course of the opinion of the court, expressions occur which tend to sustain the Government's contention, but these are beyond the point involved, and therefore do not come within the rule of *stare decisis.*"

There was no sardonic import in the remarks of the court that appellants "not only had their day in court, but their months and years," but, rather, genial amusement was aroused in the court when it compared the thought of a "day in court," with the fruitless but repeated progress of the appellants thrice to the Supreme Court of Kansas, to the Federal District and Circuit Appellate Courts, and twice to this court, as revealed in the citations mentioned just preceding the remark as to "months and years."

The very observations of which appellants complain, that they had not been denied due process and had had their months and years in court, are linked by the Missouri Supreme Court with the statement in the following sentence that none of their "many other assignments of error" mentioned in the same paragraph is germane to the question whether the challenged petition contained a misjoinder of plaintiffs or failed to state a joint cause of action, thus saying forcefully that *the point of decision had been passed in the preceding paragraph* (193 S. W. (2d), l. c. 591) (822, 823), in which the court had said that the ground of misjoinder of parties, the sole ground on which the trial court sustained the demurrers, was right and sufficient. In *Choteau* v. *Gibson,* 111 U. S. 200, 28 L. Ed. 400, this court held in sustaining a motion to dismiss a writ of error to the Supreme Court of Missouri for want of jurisdiction that

> "From the beginning it has been held that, to give us jurisdiction in this class of cases, it must appear

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> affirmative on the face of the record, not only that a Federal question was raised and presented to the highest court of the state for decision, but that it was decided, or that its decision was necessary to the judgment or decree rendered in the case * * * The legal effect of the judgment set up in bar is a question of general law as to which the decision of the state court is not reviewable here. The Federal questions, if any there were in the case, lay behind this defense and could not be reached until it was out of the way."

In the instant case, the Federal questions, if any except those raised as to Sec. 948, R. S. Mo. 1939, lay behind the ground of the demurrers that (whatever Federal claims appellants sought to assert), they could not maintain their action jointly. The questions as to Sec. 948 *id.* were non-substantial and frivolous and the remaining Federal questions could not be reached until after the decisions of the point as to misjoinder of plaintiffs was out of the way.

4. Yet if there were any merit to the groundless contention of appellants that the State Supreme Court did decide that the challenged petition alleged no denial of due process and hence failed to state a cause of action so that such decision could be construed as holding R. S. U. S., Secs. 1979, 1980 and 1981 invalid (Response, pp. 7, 14, 15), it would avail appellants nothing.

Fox Film Corp. v. *Muller*, 296 U. S. 207, l. c. 211, 80 L. Ed. 158, l. c. 160, was on certiorari to the Supreme Court of Minnesota to review a judgment of a district court of the state. This court held:

> "The non-Federal question in respect of the construction of the contracts and the Federal question in respect of their validity under the Anti-Trust Act were clearly independent of one another (citing cases). *The case, in effect, was disposed of before*

the Federal question said to be involved was reached (citing cases). *A decision of that question then became unnecessary; and whether it was decided or not, our want of jurisdiction is clear.*

Writ dismissed for want of jurisdiction." (Emphasis supplied.)

In *DeSussure* v. *Gaillard*, 127 U. S. 216, l. c. 232, 32 L. Ed. 125, l. c. 131, 132, in error to the Supreme Court of South Carolina, it was held that:

" * * * the Supreme Court of the State of South Carolina in its opinion in this case passed upon the Federal question sought to be raised by the plaintiff as the foundation of his case, and decided adversely to him; but * * * the decision of that question was not necessary to the judgment. Before reaching that question the Supreme Court had already decided that the action of the plaintiff could not be sustained, according to the meaning of the provision of the statute under which it was brought. The decision of that point was final, and was fatal to the plaintiff's right of recovery. That question is not a Federal question; it does not arise under the Constitution of the United States, or under any law or treaty made in pursuance thereof. It is not a question, therefore, which, under this writ of error, we have a right to review * * *

"It is a statute conferring certain rights upon suiters choosing to avail themselves of its provisions upon certain conditions in certain cases. Who may sue under it, and when, and under what circumstances, are questions for the exclusive determination of the state tribunals, whose judgment thereon is not subject to review by this court."

The court then quotes the "well-settled rule" that where the record shows that the judgment below might have

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been based on a law raising a Federal question or alternatively on an independent ground and that the court did in fact base its judgment on the independent ground and not otherwise, this court will not take jurisdiction of the case even though it might think the position of the state court unsound.

Misjoinder sole ground of decision.

The non-Federal question of misjoinder, under the then applicable Missouri Code of Civil Procedure was adequate, was the sole ground of decision relied upon by both the State Circuit and Supreme Courts, after disposal by the Supreme Court of the frivolous and nonsubstantial questions as to Sec. 948, R. S. Mo. 1939; and the announced decision relegated all remaining Federal questions to a position where their decision was unnecessary, and was insufficient to give jurisdiction to this court under the above and many other applicable authorities.

Time will not permit review of the inapplicable authorities cited by appellants in their Statement as to Jurisdiction, pp. 29-32, as printed. It will be found that a number of these could only apply if the appellants were correct instead of in error in their contention that the Supreme Court of Missouri decided that their petition did not state a cause of action and that the decision of the court turned on that point. Such is *Cresswill* v. *Grand Lodge*, 225 U. S. 246. It is true that it is the province of this court to inquire whether the decision of the state court rests on a fair or substantial non-Federal basis. We submit that the result of such inquiry will show that the non-Federal basis of the state court decision was adequate and that appellants have completely failed to sustain the burden which rests upon them, of affirmatively showing jurisdiction in this court. *Gorman* v. *Washington University*, 316 U. S.

98, 62 S. Ct. 862, l. c. 864; *Memphis Natural Gas Co.* v. *Beeler*, 315 U. S. 649, 62 S. Ct. 857.

II.

The appellees' MOTION TO STRIKE ALL OR CERTAIN PARTS OF APPELLANTS' STATEMENT OF POINTS ON WHICH THEY INTEND TO RELY was well grounded, and abundantly justified appropriate action thereon by this court, and did not constitute a waiver or abandonment of appellees' right to be heard on the MOTION TO DISMISS OR AFFIRM.

A.

Appellants quoted (Response, p. 2) from Robertson and Kirkham, Jurisdiction of the Supreme Court of the United States, Section 364, page 752. As they failed to note or heed the first sentence of the paragraph in which said excerpt appears, we quote the paragraph, indicating the part so omitted by italics, as follows:

> "*The purpose of the requirement of a statement of points to be relied upon is to afford appellant a further opportunity to weed out prolix, defective or unnecessary assignments of error.* Where counsel are satisfied with the assignment of errors, it is a common practice to file a statement adopting the assignment of errors as the statement of points required by Rule 13."

Here, instead of heeding such admonition, appellants attempted to add two additional assignments, while seeking to adhere to all previous ones.

In the same work, Section 357, page 728, which section was used as a footnote to the above quoted section, the authors say:

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"The assignment of errors should 'present to the court a clear and concise statement of material points on which the plaintiff in error (appellant) intends to rely,' for the purpose of enabling 'the court and opposing counsel to see on what points plaintiff's (appellant's) counsel intend to ask a reversal of the judgment, and to limit the discussion to those points.' Undue prolixity defeats this purpose, and fault in that respect may be taken by the court as sufficient ground for the dismissal of the appeal. The presentation of 'jumbled assignments,' lacking in clarity, may also result in dismissal."

Appellants, we believe, have violated the rules of this court in each of the several respects mentioned, and justified the sustaining of our motion to strike out.

B.

Even if appellants may adopt as a statement or designation of points, the Assignment of Errors theretofore filed, we contend that under the rules of this court, appellants, in making such designation, cannot state points not embraced within their Assignment of Errors filed in the state court (Rule 9; Rule 13, Subdivision 9, of this court).

Furthermore, our Motion to Strike is leveled in part against the vague, indefinite, uncertain and prolix Assignment of Errors. This applies not only to the original Assignment of Errors, but also to the alleged Points and the additional Assignment of Errors included therein. Regardless of what alleged errors may have been committed by the state court, they can only be urged in the Supreme Court of the United States if brought before this court by revealing assignment of errors.

As will elsewhere appear in this REPLY, in Subdivision I of their belated additional assignment of errors, under caption, "STATEMENT OF POINTS, Assignment

of Errors," appellants now attempt to allege error on grounds not set forth in the original Assignment of Errors. An examination of the original Assignment of Errors will disclose that no such assignment of errors as those so set forth anywhere appear in the original Assignment of Errors filed in the state court in connection with the appeal, nor will there be found therein any assignment of errors which makes the real contention now so tardily advanced that the right to sue jointly herein was claimed by the appellants as a part of the rights accruing under the Civil Rights statutes.

Appellants in their RESPONSE do not make any satisfactory explanation of the reasons which caused them to incorporate Subdivision II as a point as well as an additional assignment of error. If it be their purpose to incorporate the alleged errors set forth under the "twenty-two numbered assignments" filed in the Missouri Supreme Court as grounds for the reversal of the judgment of the lower court, then it must be clear under the authorities herein cited that appellants cannot, under the rules of this court, make additional assignments of error by incorporating matters not appearing in the original Assignment of Errors filed in this court, and, furthermore, that they cannot designate as a point relied upon matters not incorporated in the original Assignment of Errors filed in connection with the appeal. If this be their purpose, instead of having made the 37 assignments set forth in their Assignment of Errors, they would be making 59 assignments of error, and the additional 22 assignments would be flagrantly violative of the rules of this court.

Appellants now accuse appellees of bad faith because they attempted to answer and comment upon matters to which the original assignments refer, pointing out assignments connected therewith. Appellees were powerless to

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do otherwise because under the rules of this court it was mandatory that our Statement Opposing Jurisdiction be filed in the state court within a prescribed time. That this burden cast upon the appellees was unjustifiably heavy is, we think, too apparent to admit of any controversy. Appellants have not only attempted to create this excessive burden by their prolix, repetitious, obscure Assignment of Errors, but also in their designation of points, concerning which the duty of the appellants to the appellees is the same, and to the court even greater.

On page 2 of the RESPONSE, appellants say:

> "Points I and II are not additional assignments of error and there is no rule requiring the statement of points to be relied upon to be filed in the lower court."

On pages 3 and 4 of the RESPONSE, appellants criticize appellees for the omission or elimination of the opening sentence in their document entitled, "APPELLANTS' STATEMENT AND DESIGNATION UNDER PARAGRAPH 9, RULE 13," which reads as follows:

> "Come appellants in the above entitled cause and adopt their Assignment of Errors in this court, *supplemented* by the following numbered Points I and II, as their statement of points to be relied upon; * * *" (Emphasis ours.)

There is no basis for the suggestion that appellees eliminated this recital or any part thereof. It should be noted that appellees' motion does not quote the recitals in this document. Quite significantly, however, appellants themselves have eliminated the following very significant part of this document immediately following the opening sentence above referred to, to-wit:

"STATEMENT OF POINTS

Assignment of Errors"

Appellants apparently now contend that it was not their intention to use the words "Assignment of Errors" therein, and that the recitals in subdivisions I and II did not constitute assignments of errors. The fact that they are also referred to as points has no significance because it was the apparent purpose of appellants to state to this court that they adopted the original assignment of errors supplemented by the assignment of errors set forth under subdivisions I and II, and submitted all of the same as their statement of points to be relied upon.

On page 4 of the RESPONSE, appellants refer to the case of *Bompart* v. *Lucas*, 32 Mo. 123. It seems to us that if the pronouncements of the court therein have any significance they apply to the appellants, on account of their very significant elimination from their brief of the words "Assignment of Errors." We shall refer to that case again herein.

Considering the purpose of these rules, it seems to us that in the present situation, if appellants are permitted to file additional assignments of errors after the time prescribed by the rules and by the law, it would give appellants greater latitude than the rules contemplate, and to the same extent improperly burden appellees, in submitting the case. Under such circumstances appellees would be put to great disadvantage, because they could not have anticipated that appellants would attempt to later add additional assignments of errors which appellees would have no opportunity to discuss in their Statement Opposing Jurisdiction. Appellants have not even attempted to explain why they used the words "Assignment of Errors" as a part of the caption to subdivisions I and II of

"APPELLANTS' STATEMENT AND DESIGNATION UNDER PARAGRAPH 9, RULE 13." This entire document should be read in the light of what is said above, because appellants' silence has, we think, real significance.

C.

Appellants state (RESPONSE, p. 4) that appellees in their Suggestions Opposing Jurisdiction, have failed to discuss certain assignments of error (which are largely repetitious of each other and of other assignments), and insinuate on page 5 that this failure was because "they can offer nothing to palliate the errors there specified."

We called the court's attention to the duplications, prolixity, obscurity and indefiniteness of these assignments in the Foreword to our discussion on pages 2-6 of our STATEMENT OPPOSING JURISDICTION, in which we said:

> "We regret the length of these suggestions but feel compelled to discuss the question involved at some length because of the long, involved and confusing Assignments of Error and Jurisdictional Statement filed by appellants. Appellants' Assignments of Error cover some six and one-half crowded pages of typewriting. Their Jurisdictional Statement covers more than thirty-three crowded typewritten pages, exclusive of exhibits."

We attempted to discuss and present as best we could under the circumstances the elements in the case which seemed relevant to the question whether or not the jurisdiction of this court was present and whether or not the appeal should be dismissed, referring only for the convenience of this court to certain of appellants' assignments of errors. We endeavored to preserve a logical order of presentation in spite of the confusion in appel-

lants' Jurisdictional Statement and Assignment of Errors. In Paragraph XV of our STATEMENT, pp. 108, 109, we stated the purpose of appellees. As fully as possible under the circumstances we have answered, at least in principle, every contention which under any circumstances could be involved on the questions properly before the court for determination, making such apt references thereto as time permitted, although in some instances we did not refer to the assignments by numbers. Under Subdivision E of this Point II of this REPLY, we have referred to Assignment 30 and have also referred to same under Point I of this REPLY. In Point I we also refer to and discuss Assignment 24.

D.

On page 9 of said RESPONSE appellants say:

> "Appellees' response to the citation informs this court that if it determine that it has jurisdiction '• • • appellees desire to file briefs and to be heard before the court at the times and in the manner provided by the rules of the court.'"

Therefrom appellants seem to contend that appellees invited the court to grant them a hearing on the merits without first passing upon the motion to dismiss or affirm.

This quotation is taken from the response filed in this court by appellees to the citation in customary form issued to appellees by the Supreme Court of Missouri on the 21st day of June, 1946, and we refer to the same as found in full in the transcript. As same is not now available to us, we call attention to the fact that same contains a paragraph referring to the document entitled APPELLEES' SUGGESTIONS OPPOSING JURISDICTION AND MOTION TO DISMISS OR AFFIRM JUDGMENT, filed

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on July 6, 1946, and the motion therein contained to dismiss the appeal or affirm the judgment. The last two paragraphs of this response are as follows:

> "The undersigned appellees respectively and respectfully state that in their opinion the grounds asserted in said document are sufficient to justify the sustaining of the said motion to dismiss said appeal or affirm said judgment; and hereby request consideration thereof by the court.
>
> The undersigned appellees further respectfully state that, if for any reason the aforesaid motion to dismiss or affirm be denied by the court or be not sustained by the court, or if the court determines that it has jurisdiction, the appellees desire to file briefs and to be heard before the court at the times and in the manner provided by the rules of the court."

We respectfully suggest that nothing contained in this response could by any contortion of language be construed as constituting a waiver by appellees of the right to be heard upon their motion to dismiss or affirm.

On pages 3 and 11 of their RESPONSE appellants intimate that by attacking their assignments of errors, appellees have waived their motion to dismiss or affirm and conferred appellate jurisdiction on this court. If appelles had not filed such Motion (to strike) promptly, and before a ruling on their Motion to Dismiss or Affirm, appellants would have contended that the attack on their assignments of errors and statement of points to be relied upon came too late. Appellate jurisdiction cannot be conferred on this court by waiver or even by consent of the parties, since it will look into its own jurisdiction even where such jurisdiction is not questioned by appellee or defendant in error. *Burnett* v. *Kinkel*, 264 U. S. 16, 19, 44 S. Ct. 254, 255, 77 L. Ed. 730. See to like effect, *Arnold* v.

United States, 263 U. S. 427, 435, 44 S. Ct. 144, 147, 68 L. Ed. 371.

Appellants' claim of jurisdiction in this court is therefore not enhanced by this intimation of waiver which is untenable.

E.

Appellants question our authorities cited to demonstrate the insufficiency of appellants' assignments of errors and assert that the citing of such authorities discloses "that the authorities as a whole destroy their contention" (RESPONSE, p. 16).

To demonstrate that the weight of authority supports our contention we quote from 3 C. J. 1398, Sec. 1550, as follows:

> "According to the weight of authority, an assignment of errors should be complete in itself and should not require reference to extrinsic matter to determine the question intended to be presented thereby."

and from 3 C. J. 1361, Sec. 1505, as follows:

> "* * * and it is held that each assignment or specification of error must be complete in itself and self-explanatory, and that it cannot be aided by an examination of the record as a whole or even by express reference to other parts of the record."

See, also, to like effect, 4 C. J. S. 1809, Sec. 1285, and 4 C. J. S. 1756, Sec. 1253. This principle is also supported by our complete quotation from appellants' own authority, Robertson & Kirkham, Jurisdiction of the Supreme Court of the United States, page 752, Sec. 354.

Appellants flagrantly violate the provisions of Rule 9, requiring assignments of error to set out separately and

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particularly each error asserted, in Assignment No. 30, reading as follows:

> "30. The court erred in holding that the fifth amended petition did not state a cause of action, did not state a joint cause of action, and that there was a misjoinder of parties plaintiff and causes of action, and that Sections 922 and 948, repealed fifteen months before the affirmance of the judgment, justified the judgment of dismissal and penalty, in violation of appellants' rights under the XIVth Amendment."

This very indefinite assignment, if properly construed, not in the light of the indefinite language thereof, but in the light of other parts of the record, can be properly said to attempt to set out at least five separate and distinct alleged errors.

F.

The practice of appellants' counsel in quoting excerpts from a decision, an opinion, a document or statement, thereby wresting and stripping same from the context so as to create an erroneous impression is evidenced by the frequent employment of such methods. We have heretofore referred to this practice in connection with other parts of the RESPONSE relating to quotations from the document entitled "APPELLANTS' STATEMENT AND DESIGNATION UNDER PARAGRAPH 9, RULE 13." We feel that in this connection we should quote the following initial sentences in Paragraph II of the last-named document:

> "The opinion of the Supreme Court of Missouri, by its statement that (820):
>
> "'Apellants claim error under twenty-two numbered assignments, some being mainly a repetition

of others. We have considered all of these assignments, but see no useful purpose in discussing each one separately.' "

And by the further statement (827):

"None of these assignments is germane to the question of whether the fifth amended petition contains a misjoinder of parties plaintiffs or fails to state a joint cause of action."

Appellants again quote the last sentence of this language on page 15 of the RESPONSE, and reproduce both clauses on page 17 of the RESPONSE. These quotations respectively appear on pages 820 and 827 of the transcript. Inasmuch as the transcript is not available to appellees, we refer to the places where these references appear in the opinion of the Supreme Court of Missouri, in this case (193 S. W. (2d) 588), on page 589, and on page 592 thereof. Same are separated by many intervening recitals dealing with numerous contentions made by appellants. So that same may be read in the light of the context, we reproduce the full paragraph on page 589 *id.*, of which the first quoted excerpt is a part (and indicate the quoted parts by the use of italics), as follows:

"The fifth amended petition, with attached exhibits, occupies two hundred pages of the printed record. The briefs are numerous and lengthy, aggregating thirteen hundred and fifty pages, citing and quoting from hundreds of decisions, many of which, we think, have no relevancy to any issue here involved. *Appellants claim error under twenty-two numbered assignments, some being mainly a repetition of others. We have considered all of these assignments, but see no useful purpose in discussing each one separately.*"

And also reproduce from page 592 *id.* the full paragraph from which the last quotation is taken (and indicate the quoted parts by the use of italics) as follows:

> "Appellants make many other assignments of error; assailing the constitutionality of Missouri statutes relating to partnership estates, and the probate laws of both Missouri and Kansas; ask us to declare void certain decisions of the Supreme Court of Kansas; invoke the treaty between this country and France in 1803, and the 'due process' and other provisions of the State and Federal Constitutions. Most if not all these questions have been decided adversely to appellants by courts of competent jurisdiction in suits brought by appellants or in which they actively participated as defendants. *Moffett* v. *Moffett,* 131 Kan. 582, 292 P. 947, 77 A. L. R. 294; *Clark* v. *Andrews,* 136 Kan. 23, 12 P. (2d) 294; *Clark* v. *Moffett,* 136 Kan. 711, 18 P. (2d) 555; *Id.* 290 U. S. 602, 54 S. Ct. 227, 78 L. Ed. 528; *Moffett* v. *Robbins,* D. C., 14 F. Supp. 602; *Moffett* v. *Robbins,* 10 Cir., 81 F. (2d) 431, *Id.,* 298 U. S. 675, 56 S. Ct. 940, 80 L. Ed. 1937. Appellants have not been denied due process. They have not only had their day in court, but their months and years. *None of these assignments is germane to the question of whether the fifth amended petition contains a misjoinder of parties plaintiffs or fails to state a joint cause of action.*"

On pages 52 to 71 of our Statement Opposing Jurisdiction we discuss this paragraph of the opinion, and also refer to and discuss many of the authorities therein cited.

It must be manifest from a most casual reading that the words quoted on page 589 have no reference to the assignments specifically mentioned on page 592, because the assignments last referred to are the specific assignments mentioned on page 592.

Whatever may have been the intention of counsel for

appellants in this regard, we insist that the manner in which appellants have quoted these two sentences is at least calculated to create an enormous impression, which would not obtain if consideration is given to all of the recitals in the document. We therefore respectfully insist that the pronouncement in the case of *Bompart* v. *Lucas*, 32 Mo. 123, l. c. 124, quoted on page 4 of appellants' RESPONSE is applicable, not to the appellees, but to the appellants.

Respectfully submitted,

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In the Supreme Court of the United States

October Term, 1946.

LOUISE MCGREW MOFFETT AND LOUISE MCGREW MOFFETT as Executrix of the Estate of Thomas S. Moffett, Deceased, *Apellants,*

VS.

COMMERCE TRUST COMPANY, a Corporation, HELEN WEEDE, B. C. HOWARD AND WILLIAM H. KOPP, *Appellees.*

No. 318.

Appellants respectfully suggest that the matter contained in this document also aids in the solution of the jurisdictional question.

APPELLANTS' MOTION PRAYING THAT THE COURT ORDER THAT MATTER DESIGNATED BY APPELLEES BE NOT PRINTED

Appellants state that appellees have filed herein a document entitled

> "Appellees' Designation of Additional Parts of the Record Which They Think Material to Be Printed on This Appeal."

The matters designated are neither material nor relevant to the issues herein. Said designation, though filed, was not a part of the record in the state court, and could not be considered by the state court on demurrer, and should not be printed as an alleged part of the record on this appeal.

The appeal herein is from a judgment affirming a judgment of the Circuit Court of Jackson County, Missouri, rendered after, without notice, it had erroneously sustained demurrers to appellants' pleading (154-323). For said reason the Supreme Court of Missouri was limited to the consideration of the allegations of the petition and demurrers.

That rule is stated in *Graves* v. *Graves*, 255 Mo. 468, thus, l. c. 480:

> "We can only consider the allegations of the petition and the demurrer."

At l. c. 479:

> "This matter cannot be considered here. This case stands here upon a demurrer to the plaintiff's petition. * * * We must adhere to the allegations of the petition here. If it states facts for relief, we must sustain it, although outside of the record before us there may be other facts detrimental to plaintiff's alleged cause of action. These matters might be raised by answer, but not by general demurrer."

This Court likewise limits itself to a consideration of appellants' pleading herein and the demurrers on the particular ground on which they were sustained by the state court.

Appellees' designated matters merely impose the burden upon Mrs. Moffett of unnecessarily paying for

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printing more than 506 useless pages, and on the clerk the burden of superintending such printing, and on the Court itself the useless task of reading same. For said reason said matters should not be printed.

The Missouri court was precluded by Missouri law from basing its judgment on alleged judicial notice of the matters in said designation.

State ex rel. v. *Eastin*, 270 Mo. 193, l. c. 210, ruled:

> "We take notice of a former appeal and of the record thereof (*Keaton* v. *Jorndt*, 259 Mo. 179); but we do not notice the facts and records in one action when called on to rule another and separate one (*Spurlock* v. *Railroad*, 76 Mo. 67; *Banks* v. *Burman*, 61 Mo. 76; 16 Cyc. 918)."

Knorp v. *Thompson*, 352 Mo. 44, l. c. 52, declared:

> "It is not just that a court should, in deciding the issues of a case, consider evidence introduced in another and different case, and thus decide a case upon evidence which a party had been afforded no opportunity to refute."

This Court, in *Stewart* v. *Masterson*, 131 U. S. 151, l. c. 158, and in *Pacific R. R. of Mo.* v. *Mo. Pacific R. Co.*, 111 U. S. 505, l. c. 518, stated the same rule.

Furthermore, appellees' demurrers admit (*Truax* v. *Corrigan*, 257 U. S. 312, l. c. 324) that said matters were overt acts pursuant to the conspiracy to deprive Mrs. Moffett of the right secured by the Constitution and laws, and are here governed by the rule that

> "A matter, the validity of which is in issue in legal proceedings, cannot be set up as a bar thereto." (Broom's Legal Maxims, 8th Ed., l. c. 133.)

Wherefore, appellants pray that this Honorable Court order that the desigation of additional parts in said document entitled

> "Appellees' Designation of Additional Parts of the Record Which They Think Material to Be Printed on This Appeal"

be not printed.

A. E. WATSON,
MARTIN J. O'DONNELL,
Attorneys for Appellants.

NOTE: The following deals with the question of jurisdiction, and of itself establishes that the motion to dismiss should be denied, and appellees' designation of 506 pages of unnecessary matter which they say they think should be printed, should be ordered not printed.

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SUGGESTIONS IN SUPPORT OF MOTION FOR ORDER THAT THE UNNECESSARY MATTER DESIGNATED BY APPELLEES BE NOT PRINTED.

I.

Appellants file the above motion and these Suggestions before the disposition of appellees' pending motions for the reason that it appears from the certified transcript, appellees' statement opposing jurisdiction, their motion to strike, and their reply to appellants' response to said motion to strike, the parties are entitled to be heard. Therefore the record must be printed. The additional matter the appellees have designated to be printed, should not be printed for the reasons stated in the motion and because it was not properly part of the record. The documents designated consist of 506 pages of matter improperly included in the transcript.

Appellees' demurrers admit the allegations of appellants' pleadings, and appellees cannot support their demurrers by said extrinsic and unnecessary matter, nor can the Court consider same.

Said papers were found amongst the files in the case. This Court has ruled:

> "The mere fact that a paper is found among the files in a cause does not of itself make it a part of the record. If not a part of the pleadings or process in the cause, it must be put into the record by some action of the court. *Sargeant* v. *State Bank,* 12 How. 371, 387, 13 L. Ed. 1028, 1033; *Fisher* v. *Cockerell,* 5 Pet. 248, 254, 8 L. Ed. 114, 116."

Said motion should be sustained at this time for the reason that it now appears that appellees agree that the

facts in the record are such as to entitle both parties to a hearing on the merits.

II.

Appellees, on page 3 of their reply, state their idea of what an inherently federal question is, which differs from what this Court has stated to be "an inherently federal question" in *Swofford* v. *Templeton*, 185 U. S. 492, quoted on page 14 of the Jurisdictional Statement. The same question is discussed at page 10 of the Jurisdictional Statement in a quotation from *First National Bank* v. *Anderson*, 269 U. S., l. c. 346, thus:

> "Whether a pleading sets up a sufficient right of action or defense, grounded on the Constitution or a law of the United States, is necessarily a question of Federal law."

The motion to dismiss thus directed to that sort of Federal question can never be sustained because Federal questions of that kind are always substantial, as pointed out in *Brown* v. *Equitable Life Ass'n*, 185 U. S., l. c. 311. It follows that the statement by this Court, "it must take jurisdiction if it should," (*Cohens* v. *Virginia*, 6 Wheat., l. c. 404) applies to this case.

III.

On page 6 of appellees' suggestions opposing jurisdiction, they say:

> "* * * the only Federal question which the Supreme Court of Missouri had occasion to pass upon, and did pass upon * * * was the contention that Section 948, R. S. Mo. 1939, was in effect a bill of pains and penal-

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> ties and a violation of the provisions of Article I, Section 10, of the Federal Constitution, which prohibits a state from passing a bill of attainder."

On page 109 appellees say:

> "Wherefore, appellees respectfully submit this statement showing that the questions upon which the decision in this case depends are so unsubstantial as not to need further argument, and appellees respectfully move the court to dismiss this appeal, or in the alternative, to affirm the judgment of the Supreme Court of Missouri."

Appellees thus agree that the state court did pass on a Federal question on page 6. On page 109 they (agreeing that there is more than one Federal question) say "the *questions*" on which this case depends are so unsubstantial as not to need further argument. But, in their response to the citation they contradict the above by telling this Court that if it rules against their motion, then that said Federal questions are so substantial that they desire to file briefs and to be heard orally before the Court in argument of the Federal questions, which they now say

> "are so unsubstantial as not to need further argument."

They also ask the Court to affirm the judgment. This, however, it cannot do and at the same time grant their request for the additional argument which they say is not needed. In their reply to appellants' response they say (p. 27):

> "The non-Federal ground of misjoinder, under the then applicable Missouri Code of Civil Procedure was adequate, was the sole ground of decision relied

> upon by both the State Circuit and Supreme Courts, after disposal by the Supreme Court of the frivolous and nonsubstantial questions as to Sec. 948, R. S. Mo. 1939."

They thus admit that the record shows that the state court passed upon a Federal question, and claim that it also decided a non-Federal question. This Court says that under such circumstances the appeal will not be dismissed, nor the judgment reversed or affirmed, without a hearing. In *Baltimore & Ohio R. R. Co.* v. *Maryland*, 20 Wall. 643, this Court held where the record shows a decision of a state court on a Federal question properly presented, and of which the court could take jurisdiction, and shows also a decision of a local question, the writ of error will not be dismissed on motion in advance of the hearing. The parties are entitled to be heard on the soundness of the decision below on the Federal question, on the sufficiency of that question to control the judgment in the whole case, and on the sufficiency of any other point decided to affirm the judgment, even if the Federal question was erroneously decided.

> "The counsel of both parties in this court are entitled to be heard when the record shows the existence of a decision which gives us jurisdiction, on the soundness of that decision, on its sufficiency to control the judgment in the whole case, and on the sufficiency of any other point decided, to affirm the judgment even if the federal question was erroneously decided."

Hence, since both parties have requested a hearing, and since appellees admit that a Federal question or questions was or were decided by the state court, but argue that a local question was also decided after the decision of the

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Federal question, it is apparent, under the above authority (*B. & O. R. R. Co.* v. *Maryland*) that the record must be printed and the cause heard on briefs and oral argument.

To the end that unnecessary expense may not be incurred, or the parties or the Court subjected to the labor of reading the unnecessary matter designated by appellees for inclusion in the printed record, that this Court should order that it not be printed.

IV.

On page 4 of appellees' reply they say that appellants never claimed the right to sue jointly until appellees' statement opposing jurisdiction suggested that appellants make such claim.

This is a most singular contention. To begin with, the physical fact that appellees devoted many pages to the futile contention that appellant could not sue in both capacities under the Federal law, indicates that appellants must have made the claim somewhere. The question is—where? Appellants' pleading first raised said question. It is still alive.

The allegations of the fifth amended petition, as amended, in paragraph 19 thereof (224-225) refers to the deprivation of the rights guaranteed to appellants as to privileges and immunities, due process and equal protection of the laws, including Sections 51 and 52 of Title 18. It is there alleged that appellees:

> "• • • by reason of the injury thus caused plaintiff, became liable to said plaintiff under and by virtue of Sections 43, 47 and 48, Title 8, United States Code, the protection of which Constitution and statutory provisions the plaintiff here and now invokes."

It is also made at other pages. By suing in both capacities, Mrs. Moffett raised the Federal questions and made the claim, and by arguing in their suggestions that she could not do so, they admitted of record that Mrs. Moffett had thus made the Federal claim. As pointed out in *Loeb* v. *Columbia Township*, 179 U. S. 472, and *Mutual Life Ins. Co.* v. *McGrew*, 188 U. S. 291, a proper way for either party to raise a Federal question is by pleading, thus making the question part of the record, showing that the claim was presented to the court.

In *Mutual Life Ins. Co.* v. *McGrew*, 188 U. S. 291, l. c. 308, it is said on that subject:

> "The proper way is by pleading, motion, exception, or other action, part, or being made part, of the record, showing that the claim was presented to the court. *Loeb* v. *Columbia Twp.*, 179 U. S. 472."

Mrs. Moffett, in other places in said pleading (154-323), further specially set up and claimed her right to sue in both capacities for the loss occasioned by the violation of her constitutional and statutory rights.

Had there not been a Civil Rights Act, Mrs. Moffett could do so under the principle applied in *Bell* v. *Hood*, 90 L. Ed. 758.

In *Fertilizer Co.* v. *Hyde Park*, Fed. Cas. No. 10336, cited in *Picking et al.* v. *Railroad et al.*, 251 Fed. (2d) 240, it was held that a corporation could base its suit on the Civil Rights Act for the reason that a corporation is a person, within the meaning of the XIVth Amendment, created by law. The same rule authorizes an executor to sue.

Appellees claim that such persons cannot jointly sustain injuries from the same wrongful acts. To state the proposition is to refute it. The "question whether a

right or privilege claimed under the Constitution or laws of the United States was distinctly and sufficiently *pleaded* and brought to the notice of a state court is itself a Federal question, in the decision of which this Court on writ of error is not concluded by the view taken by the highest court of a state" (*Carter* v. *Texas*, 177 U. S. 442). As pointed out in the Jurisdictional Statement (pp. 7-8):

> "The facts alleged are admitted by the demurrer, and, in determining their legal effect as a deprivation of plaintiff's legal rights under the 14th Amendment, we are at as full liberty to consider them as was the state Supreme Court." (*Truax* v. *Corrigan*, 257 U. S. 312, l. e. 324.)

The demurrer admitted that Mrs. Moffett in both capacities sought to recover under the Federal law.

Appellees claim that the assignments of error do not raise the question that the right to sue jointly in this case was afforded by the Civil Rights Statutes is as barren of merit as their claim that a *pleading* cannot raise a Federal question. They overlook the consideration that the Civil Rights Statutes were enacted to enforce the rights secured by the XIVth Amendment by any person, under color of a statute of any state. And so assignment 23 (937) that:

> "23. The court erred in holding that appellants' rights, under the Constitution and Laws of the United States, were not denied to her by the judgment dismissing the case on an alleged ground of misjoinder of parties plaintiff,"

preserves the question. See, amongst other assignments preserving the question, 20 and 34.

The error could only be claimed as to the Constitution and laws mentioned in the record, which laws included the Civil Rights Acts.

Their claim on this question is as utterly baseless as their claim that the Federal questions, which the state court held were not "germane" to the finding of misjoinder, were not considered decided by the state court when it decided that they were not "germane." It could not so decide unless it considered and decided them, for, again to quote Judge Sherwood on a kindred question:

> "*Whenever the sufficiency of the evidence is considered, necessarily you must consider its insufficiency. The two are inseparable in thought.*" (*State* v. *Cushenberry*, 157 Mo. 168.) (Court's italics.)

V.

This Court, in *Magwire* v. *Tyler*, 17 Wall. 253, l. c. 286; the Supreme Court of Missouri, in *Beattie Mfg. Co.* v. *Gerardi*, 166 Mo. 142, l. c. 153 and 155, and the Missouri appellate court, in *Purdy* v. *Pfaff*, 104 Mo. App. 331, l. c. 339, have expressly held that Section 922, R. S. Mo. 1939, did not authorize a demurrer on any ground save those set forth therein which never included the ground of misjoinder of parties.

This Court quoted the section as it was in 1873, and thus decided as to a case involving a Federal right in a state court, that the Missouri Supreme Court could not deny a Federal right by resorting to the Code of Civil Procedure of the state as an excuse for denying it.

The Honorable Frank Hagerman, relying thereon in *Armour* v. *Roberts*, 151 Fed. 846, joined the administrator, guardian and heirs in that case, and was sustained therein by one of the great judges of the nation. Mr. Hagerman

was one of the great lawyers of the nation, as shown by his retension as chief counsel in *Wilson* v. *New*, 243 U. S. 332.

The opinion of this Court, in *Magwire* v. *Tyler*, was incorporated in Section 922 as much as if written therein by the seven revisions since 1873 without a change. And the opinions in the above Missouri cases were likewise embodied therein by virtue of four revisions thereafter.

In said constructions this Court, in 1873, and the Missouri court, in the years 1901 and 1904, held that:

> "No other grounds of demurrer are allowed by the statutory rules of pleading." (*Magwire* v. *Tyler*, 17 Wall. 253, l. c. 286.)
>
> "* * * no pleading is demurrable unless it is subject to one or more of the objections specified in the provisions of the Code defining the grounds of the demurrer." (*Beattie Mfg. Co.* v. *Gerardi*, 166 Mo. 142, l. c. 153.)
>
> "Section 598, Revised Statutes 1899, *supra*, specifies the grounds upon which a pleading may be demurred to, and nothing not specified in it can be a ground therefor." (*Beattie Mfg. Co.* v. *Gerardi*, 166 Mo. 142, l. c. 155.)
>
> "Under the Code, the office of a demurrer is the same as it was at common law, it still is directed to the legal effect of the pleading for defects apparent on the face of the pleading, *but is confined in range to the statutory limits*. Bliss, Code Pleading, Sec. 404; *Beattie Mfg. Co.* v. *Gerardi*, 166 Mo. 142." (*Purdy* v. *Pfaff*, 104 Mo. App. 331, l. c. 339.)

In *Ex Parte Carey*, 306 Mo. 287, the *court* en banc said of the construction of two statutes and the effect of revision thereafter, l. c. 294:

> "This construction has been acquiesced in by the Legislature for more than thirty years. Not only that,

> but the Legislature, after such judicial construction had been placed upon Section 4092, reincorporated it without change or amendment into two subsequent revisions of the statutes, thereby adopting the construction. *The construction has therefore become a part of the statute itself.* If the statute as so constructed does not measure up to the requirements of adequate law enforcement, as now conceived, *the remedy lies with the Legislature* rather than with this court."

See, also, *Sanders* v. *St. Louis & N. O. Anchor Line*, 97 Mo. 26, l. c. 30-31; *Kansas City Public Service Co.* v. *Ranson*, 328 Mo. 524, l. c. 536. Sutherland on Statutory Construction, 2d Ed., Sec. 403, points out that said rule of statutory construction is universal.

The Missouri rule as to the effect of revisions of statutes after construction is the same as that followed by this Court.

In *Georgia Railway & Electric Co.* v. *City of Decatur*, 295 U. S. 165, it is held, l. c. 170, that the construction by the highest court of a state of one of its statutes

> "• • • becomes part of the statute as much as though it were found in appropriate words in its text."

And so the state court was without jurisdiction to sustain the demurrer on the ground of misjoinder of parties plaintiff. And hence the alleged non-Federal ground is not broad enough to sustain the judgment. Nor was it an independent ground because so interwoven with the Federal questions as to be incapable of separate treatment and determination, and consequently the alleged non-Federal ground of the decision being plainly untenable, cannot defeat review.

Ward v. *Love County*, 253 U. S. 17.
Abie State Bank v. *Bryan*, 282 U. S. 765.
Lawrence v. *State Tax Commission*, 286 U. S. 276, 282.

Especially since the state court cannot legally render the same judgment on reversal and remand, because the statutes on which the state court acted are no longer in force, and the new statutes prohibit the same judgment.

In *Murdock* v. *Memphis*, 20 Wall. 590, this Court said, l. c. 635:

> "But in the other cases supposed, why should a judgment be reversed for an error in deciding the Federal question, if the same judgment must be rendered on the other points in the case? And why should this court reverse a judgment which is right on the whole record presented to us; or where the same judgment will be rendered by the court below, after they have corrected the error in the Federal question?"

Answering its own question, the court then pointed out that if the state court had power to render the same judgment after reversal by this Court because of the erroneous decisions of the Federal questions by the state court, then that this Court would not render a judgment which would simply be, l. c. 635:

> "* * * a useless and profitless reversal, which can do the plaintiff in error no good, and can only embarrass and delay the defendant, * * *"

In *Herb* v. *Pitcairn*, 324 U. S. 117, this Court applied the same rule applied in *Murdock* v. *Memphis* as a reason

for refusing to reverse because of erroneous decision of Federal questions by the state judgment and said, l. c. 125-126:

> "We are not permitted to render an advisory opinion, *and if the same judgment would be rendered by the state court after we corrected its views of Federal laws,* our review could amount to nothing more than an advisory opinion."

In view of the fact that the Missouri Supreme Court in its opinion declares

> "Section 922, *although now repealed,* was in force on December 30, 1944, the date Judge Ridge ruled on the demurrers,"

and in view of the fact that the Supreme Court in its opinion points to the new Civil Code, Mo. Laws 1943, pp. 353-397, as declaring that it went into effect "on January 1, 1945," and not before, thus:

> "This code will take effect on *January 1, 1945,*"

it follows that both the Legislature of the state and its Supreme Court have declared that the new code repealed the old law under which the state, circuit and Supreme Court acted, and substituted therefor the positive command that on January 1, 1945, and thereafter the Missouri courts must obey the command that

> "Misjoinder of parties is not ground for dismissal of an action,"

then said new code, as interpreted by the Supreme Court of the state in this case, demonstrates that the reversal because of the Federal errors would not be

> "* * * a useless and profitless reversal which can do the plaintiff in error no good and only embarass and delay the defendant."

And, furthermore, said reversal would not constitute an advisory opinion, as outlined by the above quotation from *Herb* v. *Pitcairn, supra.*

VI.

Appellees make an unfounded attack upon the abstract of the record before the Supreme Court of Missouri, now included in the certified transcript, to which answer has been made in appellants' brief at pp. 32 to 49, inclusive. We supplement that by dealing with the present form of said attack. On pp. 13-14 of their reply they say:

> "In Appellants' Brief on page 33 and at the top of page 36 are repeated quotations of a purported recital on page 406 of the Record as printed in the Missouri Supreme Court, reciting that without evidence, notice, hearing or jurisdiction, the circuit court entered the challenged judgment of dismissal. The mentioned paragraph is obviously an interpolation by counsel who prepared the record. No court ever stultified itself by authorizing a record of its proceedings to be made, showing that the court was preceeding to enter a judgment without hearing evidence or arguments, and in the absence of notice and jurisdiction to act."

Appellees seem to think that if a judge commits an error, then that his act in authorizing a record showing the truth as to what he did amounts to a stultification.

It is evident that what Judge Ridge did when he allowed the bill of exceptions was to authorize a record of the proceedings to be made showing that he entered a judgment without hearing, evidence or argument, and in the absence of notice and jurisdiction to act. By doing so Judge Ridge merely did his duty.

As pointed out on pages 32-33 of appellant's brief, appellees failed to avail themselves of the method provided by Section 1194, R. S. Mo. 1939, to correct an abstract of the record. That they were fully familiar with the method is shown by the fact that they filed a counter-abstract which never questioned the recital on page 406. It also appears that said counterabstract was filed on December 6, 1945, while their motions questioning the correctness of the abstract were filed on October 29 and 30, 1945 (446-456).

In this connection we direct attention to suggestions filed by appellants on November 16, 1945, and included in the certified copy of the transcript of the record (466-476) as to what the law of the state was on the question.

Appellees now say that "following a procedure authorized by *Yellow Mfg. Acceptance Corp.* v. *American Taxicabs,* 340 Mo. 1200" (that case will be found in 344 Mo.), they moved to strike said paragraph. That that decision did not authorize them to file a motion to strike said recital in this case is shown by the opinion in that case, from which it appears that the abstract there stricken was stricken because it was not served in time, l. c. 1210:

> "• • • on the grounds that it was not served within the time required by our Rule II • • •".

Not having been served in time, it was no part of the record.

Appellees state (p. 14) that the state court:

> "• • • in effect upheld present appellees' motion by ruling that the challenged judgment 'is correct in form and in accordance with law.' "

In other words, they again beg the question. It is because the judgment is not correct in form, nor in accordance with the law, that this case is here on appeal, and appellees again violate Broom's maxim on the subject. Furthermore, there is not a syllable in the opinion that justifies such assertion.

In *Badger Lumber Co.* v. *Knights of Pythias,* 157 Mo. 366, l. c. 379-380, referring to the statute which provides a method for correcting an abstract, the court said, l. c. 380:

> "Moreover, it provided within itself a method to prevent imposition on this court, by requiring respondent, if dissatisfied, to file an additional abstract within a certain time, and if the parties could not concur as to the record, the clerk should certify to this court so much of the record as is in dispute."

Goode v. *Coal Company,* 179 Mo. App. 207, points out that an abstract can not be questioned by evidence otherwise than as provided by the statute, saying, l. c. 210:

> "The statute (Sec. 2048, R. S. 1909) clearly points out that if an appellant's abstract is not satisfactory to the respondent, the latter shall file an additional abstract. If this is not accepted by the appellant he must specify his objection in writing and the original record will be ordered up for inspection by the court."

In *State ex rel. Crider* v. *Wagers,* 47 Mo. App. 431, l. c. 437, it is said:

> "If the course indicated in this statute had been taken by defendants, then we would have been able to decide whether the relator's abstract is true or false in respect to the disputed particulars; but, as it

> is, *we must accept the same as correct, notwithstanding the challenge of the defendants.*" (Italics ours.)

In *Muehlebach* v. *Muehlebach Brewing Co.*, 242 S. W. 174, at page 176 the opinion says:

> "While there is some controversy as to whether these matters did or did not happen in the presence of the jury, in view of the fact that respondent's abstract of the record shows that they did not, we must take the recitals in respondent's abstract to be true."

So that, in and of itself alone, said recital destroyed the judgment. But it is supplemented by the bill of exceptions, signed by Judge Ridge and made part of the record, more definitely and exactly showing how and in what manner Judge Ridge violated appellants' Federal rights by proceeding without the notice or hearing required by the rule and the law as a condition precedent to jurisdiction to decide the demurrers or render the judgment rendered.

Appellees claim, on page 5 of their reply, that under heading "Appellants' Claim A Refuted":

> "Section 948, R. S. Mo. 1939, authorized no judgment which would bar a future action on the same facts, and the judgment rendered was proper thereunder. (Statement Opposing Jurisdiction, pp. 18, 19, 20.)"

In answer we say, the trial judgment was in effect to "Go hence without day." If this would not prevent another action, Judge Clark's opinion certainly would, for it definitely decides that appellants

> "• • • have not only had their day in court, but their months and years."

In the case of *Swing* v. *Furniture Company*, 150 Mo. App. 574, the court said of an identical judgment under the same statute, l. c. 582:

> "The judgment entered in the present instance purports to be final in that it directs that the plaintiff take nothing by his suit and that the defendant go hence without day, recover treble costs and have execution therefor. The principle is well established that where a matter has been once finally adjudicated the parties to the action are for all time precluded from raising that question again. * * * The statute above referred to authorizes the court, upon sustaining the third demurrer, to do no more than enter the usual judgment on demurrer, give judgment for the penalty of treble costs and dismiss the petition, thus leaving the plaintiff free to institute a new suit if he chooses to do so. (*Gordon* v. *Burris*, 125 Mo. 39, 28 S. W. 191; *Bennett* v. *Southern Bank*, 61 Mo. App. 297.)"

And, therefore, the 506 pages of the transcript designated by appellees should not be printed, and we respectfully submit that this Court should so order.

A. E. Watson,
Martin J. O'Donnell,
Attorneys for Appellants.

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In the Supreme Court of the United States

October Term 1946.

LOUISE MCGREW MOFFETT and LOUISE MCGREW MOFFETT as Executrix of the Estate of Thomas S. Moffett, Deceased, *Appellants,*

VS.

COMMERCE TRUST COMPANY, a Corporation, HELEN WEEDE, B. C. HOWARD and WILLIAM H. KOPP, *Appellees.*

MOTION FOR REHEARING AND SUGGESTIONS IN SUPPORT THEREOF.

No. 318.

MOTION FOR REHEARING.

Appellants respectfully pray for a reconsideration of the questions decided herein on October 14, 1946, and that the Court hold for naught its order heretofore entered herein, and ask that said cause be then docketed and set

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down for hearing upon its merits, and as grounds therefor appellants state:

I.

This Court, in *M. K. & T. Ry. Co.* v. *Wulf*, 226 U. S. 570, affirmed the decisions of the lower courts permitting Mrs. Wulf to sue in the same capacities in which Mrs. Moffett was denied the right to sue herein, on a cause created by a Federal Law, as is Mrs. Moffett's case, and the conflict between the decisions in both cases necessitates a rehearing.

(See pp. 5-12 of Suggestions in Support of this Motion.)

II.

The only applicable remedial law in this case consists of the Federal Civil Rights Acts, which were themselves remedies provided by Congress to enforce the Civil War Amendments, which Federal remedies covered the entire field to the exclusion of all state remedial laws, and which Federal remedies were available to Mrs. Moffett, by their terms, to recover the damages caused by appellees' violation of her rights under said amendments and said Civil Rights Acts, which Acts constitute the supreme law in this case.

(See pp. 12-26 of Suggestions in Support of this Motion.)

III.

The Civil Rights Acts authorized Mrs. Moffett to bring the action in each and every capacity in which she was injured and damaged. And the action of the state court in dismissing the case on the ground of misjoinder of parties plaintiff, and of this Court in dismissing the appeal

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herein, deprived Mrs. Moffett of the Federal rights given to her by said Acts.

(See pp. 26-35 of Suggestions in Support of this Motion.)

IV.

Burt v. *City of New York et al.*, 156 Fed. (2d) 791 (C. C. A. 2), and *Picking et al* v. *Pennsylvania R. Co. et al.*, 151 Fed. (2d) 240 (C. C. A. 3), construe and apply Sections 43 and 47, Title 8 U. S. C. A., holding that under the decisions of this Court said statutes are valid, and that statutes of a state cannot operate to deprive Mrs. Moffett of the rights given by the Federal Statutes.

(See pp. 35-39 of Suggestions in Support of this Motion.)

V.

Had Mrs. Moffett instituted this action in one capacity to the exclusion of the other, the decision of the Missouri court for or against her would have prevented another action in the other capacity, and so she was entitled, as against a demurrer on the non-demurrable ground of misjoinder of parties plaintiff, to recover in the state court in both capacities.

(See pp. 40-41 of Suggestions in Support of this Motion.)

VI.

Rule 29 of the trial court was the law of the court (*Irrigation Co.*, v. *Gildersleeve*, 174 U. S. 603, l. c. 608-609, *Meierhoffer* v. *Hansel*, 294 Mo. 195) binding parties, judge and court, and failure to obey it deprived Mrs. Moffett of the Federal rights secured by Section 1 of the XIVth Amendment.

(See pp. 42-50 of Suggestions in Support of this Motion.)

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VII.

The decision of the state court sought to be reviewed was not based on a non-Federal ground adequate to support it because:

1st. The Civil Rights Acts provided an exclusive remedy and authorized Mrs. Moffett to sue in both capacities.

2nd. A demurrer on the ground of misjoinder of parties plaintiff was not allowed by the state law.

(See pp. 50-61 of Suggestions in Support of this Motion.)

A. E. WATSON,
MARTIN J. O'DONNELL,
Attorneys for Appellants.

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SUGGESTIONS IN SUPPORT OF MOTION FOR REHEARING.

I.

This Court, in *M. K. & T. Ry. Co.* v. *Wulf*, 226 U. S. 570, affirmed the decisions of the lower courts permitting Mrs. Wulf to sue in the same capacities in which Mrs. Moffett was denied the right to sue herein, on a cause of action created by a Federal law, as is Mrs. Moffett's case, and the conflict between the decisions in both cases necessitates a rehearing.

The per curiam opinion and decision herein is in conflict with the opinion and decision of this Court in *M. K. & T. Ry. Co.* v. *Wulf*, 226 U. S. 570. In that case Mrs. Wulf, by an amendment as here, sued in two capacities, as here, and recovered a judgment as an individual and as administratrix of the estate, in a Federally created cause of action of which Mrs. Wulf was the sole beneficiary, as was Mrs. Moffett herein (155). The judgment rendered in the trial court, and affirmed by this Court and by the Circuit Court of Appeals (192 Fed. 919) (C. C. A. 5) in the Wulf case is as follows:

> "It is therefore considered by the court and so ordered, adjudged and decreed, *that the plaintiff, Sallie C. Wulf, in her individual capacity and as administratrix* of the estate of Fred S. Wulf, deceased, do have and recover of the defendant, the Missouri, Kansas & Texas Railway Company, a corporation, the sum of seven thousand ($7,000.00) dollars, with interest thereon at the rate of 6 per cent per annum from this date, and all costs of suit for which let execution issue."

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Said judgment is shown by the certified copy thereof marked Exhibit "A" and hereto attached; and is also shown in the records of the Wulf case in this Court, No. 517, October Term 1912.

There defendant before, at and after the trial, raised the same objections as to misjoinder of parties plaintiff as appellees herein raised to Mrs. Moffett's capacities herein. The record in that case preserved the question 1st, by the motion to elect; 2nd, by the motion for a new trial; and 3rd, by assignment of error in the Circuit Court of Appeals, thus:

> "X. The court erred in overruling defendant's motion to require plaintiff to elect whether she would prosecute this suit in her own right or as administratrix."

On writ of error to this Court, it specifically approved the actions of the trial court in permitting the amendment adding Mrs. Wulf as administratrix, and of the court of appeals (192 Fed. 919) (C. C. A. 5) in affirming said judgment of the trial court, and thereupon affirmed said judgment. In its opinion the following appears in the language of Mr. Justice Pitney, l. c. 572:

> "* * * plaintiff is the sole heir, next of kin, and beneficiary of the estate of the said Fred S. Wulf deceased."

At l. c. 273:

> "* * * plaintiff filed her first amended original petition averring that she was the sole heir and next of kin of Fred S. Wulf, deceased; * * * 'there now exists no necessity for an administration * * * unless the same should be necessary for the sole purpose of prosecuting this suit * * * said plaintiff being the next of kin and sole beneficiary of whatever may

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> be recovered in this suit. She therefore sues in her original capacity as such sole beneficiary and next of kin; but in the event it shall be determined that she is not entitled to recover in said capacity, then she asks that she be allowed to recover as administratrix for her benefit as aforesaid. Therefore *she sues both in her individual capacity and as administratrix,* as aforesaid.' "

At l. c. 574:

> "This amendment was allowed by the court, and an order was made permitting the plaintiff to prosecute *as the personal representative of the deceased for her individual benefit, as well as in her individual capacity.*"

The decision of this Court in the Wulf case was wholly based on the exact point involved in this case, and no other, in permitting Mrs. Wulf to proceed in both capacities. The opinion says, l. c. 575 and 576:

> "The argument for reversal rests wholly upon the mode of procedure followed in the circuit court. • • •
> "The change was in form rather than in substance. (*Stewart* v. *Baltimore & O. Ry. Co.* 168 U. S. 445, 42 L. ed. 537, 18 Sup. Ct. Rep. 105.)"

This Court, in *Magwire* v. *Tyler,* 17 Wall. 253, l. c. 286, construing the Missouri demurrer statute, said:

> "A demurrer for want of form is not allowed; nor is the jurisdiction of the court in any way affected by forms."

This Court's opinion in the Wulf case, *supra,* finds support and analogy in the rule which authorizes an executor to appear individually or as executor, when a plaintiff, *in any tort action for damages.*

In Williams on Executors, Vol. II, p. 77 *et seq.*, it is said:

> "Upon the death of the testator or intestate, if any injury is afterward done to the goods or chattels, the executor or administrator may bring an action for damages for the tort. And, under such circumstances, he has the option, either to sue in his representative capacity, and declare as executor or administrator, or to bring the action in his own name, and in his individual character."
>
> "This right of action, and option as to the form in which it should be brought, exists in the executor or administrator, whether he has ever had actual possession of the property or not."

The form of the action in tort, both at common law and under modern rules, does not prevent whatever judgment is rendered from binding the plaintiff in both capacities.

See also *White* v. *Pulley*, 27 Fed. 436, citing Williams on Executors, and approving the joinder of an individual who was also administrator.

The principles applied by this Court in the Wulf case, *supra*, have been incorporated into the law of Missouri by the decisions of the Supreme Court of Missouri.

Appellants' brief, on page 86, refers to *Drakopulos* v. *Biddle*, 288 Mo. 424, wherein the trial court struck out a fifth amended petition. The State Supreme Court reversed the trial court and held that, l. c. 433:

> "The only concern of defendants as to parties plaintiff is that whoever prosecutes the action shall be competent to maintain it in such a way as to bar any other action for the same injury."

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That court held that, as applied to that tort action, this Court correctly declared the applicable law in the Wulf case. Thus:

> "We are further fortified in the view we take of the amendment in this case by the opinion of Mr. Justice Pitney of the United States Supreme Court in *M. K. & T. Ry. Co.* v. *Wulf*, 226 U. S. 570. In that case the action had been instituted by the mother of the deceased, as his sole heir, and subsequently she was appointed administratrix and was made a party plaintiff."

In *New York Central & H. R. Co.* v. *Kinney*, 260 U. S. 340, this Court recognized the right of a plaintiff to sue in both capacities in a tort action under an act of Congress, and followed the holding in the Wulf case on that point, saying, l. c. 345:

> "In *Missouri, K. & T. R. Co.* v. *Wulf*, 226 U. S. 570, 57 L. ed. 355, 33 Sup. Ct. Rep. 135, Ann. Cas. 1914B, 134, the declaration was by the mother as sole heir and next of kin of an employee of the plaintiff in error, in terms referring to a statute of Kansas giving her a right of action for injuries resulting in death. An amendment was allowed, more than two years after the injury, in which the plaintiff declared *both as sole beneficiary and next of kin and as administratrix*, and relied both on the Kansas law and on the act of Congress."

Mrs. Moffett exercised her option as to the form in which the action should be prosecuted, in accordance with the principles stated by Williams on Executors and by this Court in the Wulf case. She also strictly complied with the provisions of the Civil Rights Acts on that question. The Wulf case was decided in 1913, and for the last

33 years it has served as a precedent and a guide to the judges of this and other courts, as shown by the great number of times (more than 500) it has been cited in Shepard's Digest. Said decision is, therefore, a controlling precedent which this Court should follow herein, unless it adheres to the rule attributed to it by Mr. Justice Roberts, in *Smith* v. *Allwright*, 321 U. S. 649, l. c. 669:

> "The reason for my concern is that the instant decision, overruling that announced about nine years ago, tends to bring adjudications of this tribunal into the same class as a restricted railroad ticket, good for this day and train only."

The reasons which moved this Court in that case to overrule the decision there involved, and which occasioned said statement by Mr. Justice Roberts, cannot apply here, for the general rule as to the authority of precedents applies to the precedent made by this Court in the Wulf case, and should compel its application to this case, and result in granting the motion for rehearing, and reversal. For this Court has ignored the decision in the Wulf case herein by dismissing the appeal, and thereby overruled it.

We reproduce some elementary authorities as to the duties of all courts, from the highest to the lowest, to follow judicial precedents. In *Bates* v. *Relyea*, 23 Wend. (N. Y.) 336, 340, it is said:

> "The court almost always, in deciding any question, creates a moral power above itself; and when the decision construes a statute, it is legally bound, for certain purposes, to follow it as a decree emanating from a paramount authority."

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In Blackstone, Commentaries, Vol. 1, 69, the rule is stated:

> "* * * it is an established rule to abide by former precedents where the same points come again in litigation, as well to keep the scale of justice even and steady, and not liable to waver with every new judge's opinion, as also because the law in that case being solemnly declared and determined, what before was uncertain, and perhaps indifferent, is now become a permanent rule, which it is not in the breast of any subsequent judge to alter or vary from according to his private sentiments, he being sworn to determine, not according to his own private judgment, but according to the known laws and customs of the land; not delegated to pronounce a new law, but to maintain and expound the old one."

1 Kent's Commentaries, 475, say:

> "If a decision has been made upon solemn argument and mature deliberation, the presumption is in favor of its correctness, and the community have a right to regard it as a just declaration or exposition of the law, and to regulate their actions and contracts by it."

Cooley's Constitutional Limitations, 49, say:

> "All judgments are supposed to apply the existing law to the facts of the case, and the reasons which are sufficient to influence the court to a particular conclusion in one case ought to be sufficient to bring it or any other court to the same conclusion in all other like cases where no modification of the law has intervened."

Sir Frederick Pollock's First Book of Jurisprudence, p. 338, contains the following:

> "For all practical purposes, it may be said that a rule of general law which has been laid down or approved, to substantially the same effect, in the House of Lords and in the Supreme Court of the United States, is the law of the English-speaking world, wherever it has not been excluded or varied by express legislation."

Why is not Mrs. Moffett entitled to the benefit of that rule in this case?

II.

The only applicable remedial law in this case consists of the Federal Civil Rights Acts, which were themselves remedies provided by Congress to enforce the Civil War amendments, which federal remedies covered the entire field to the exclusion of all state remedial laws, and which federal remedies were available to Mrs. Moffett, by their terms, to recover the damages caused by appellees' violation of her rights under said amendments and said Civil Rights Acts, which Acts constitute the supreme law in this case.

The decision dismissing the appeal is based on a purported but nonexisting rule of state law, thus:

> "*Per Curiam:* The motion to dismiss is granted, and the appeal is dismissed for the reason that the dicision of the state court sought here to be reviewed was based upon a non-Federal ground adequate to support it. *Enterprise Irrigation District* v. *Canal Co.*, 243 U. S. 157, 165; *Utley* v. *St. Petersburg*, 292 U. S. 106, 111."

Whereas, appellants' pleaded right to recover is based upon the provisions of the Constitution and of the Civil Rights Acts specified in the petition, because of the wrongful acts done by appellees under color of state law, in combination with officials exercising the powers of the

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states of Missouri and Kansas, to-wit, a Kansas district judge and Commerce Trust Company as alleged Missouri executor and administrator of estates. The pleading asserting these rights includes the following allegations, thus (225):

> "That the said defendants used the judicial power of the state of Kansas, through the said district judge, thus unlawfully and intentionally to deprive this plaintiff of her privileges and immunities as a citizen of the United States and of her property, contrary to the command of Section 1 of the XIVth Amendment to the Constitution of the United States, commanding that no state shall deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws; and that the said false document, Exhibit No. 8, was so used by the said defendants, with the knowledge, consent and sanction of the then judge of said District Court, to accomplish said purpose; and plaintiff was thereby denied the rights secured to her by the Constitution and laws of the United States, and especially by the said provisions of said XIVth Amendment to the Constitution of the United States, and by the provisions of Sections 51 and 52 of Title 18, United States Code, prohibiting all persons from using the authority of the state of Kansas in denying to plaintiff the rights secured to her and all other citizens by said United States Constitution and laws, and from conspiring to deprive her of such rights under said Constitution and laws; and the said defendants, by reason of the injury thus caused plaintiff, became liable to said plaintiff under and by virtue of Sections 43, 47 and 48, Title 8, United States Code, the protection of which Constitution and statutory provisions the plaintiff here and now invokes."

And also (287-288):

> "That the rights of said Thomas S. Moffett and of this plaintiff in and to the said property were violated by the defendants pursuant to the said conspiracy in causing plaintiff and her said husband to be denied the protection of Sections 43, 47 and 48, Title 8, and Sections 51 and 52, Title 18, United States Code, and of the protection of Section 1 of the XIVth Amendment to the United States Constitution. * * *"

A case in which the plaintiff founds his claim on the Federal Constitution, a federal statute, or a Treaty, is clearly one involving a federal question, since its decision turns on a proper application of one or the other, or all, of those forms of federal law.

Cohens v. *Virginia*, 6 Wheat. 264.
Osborn v. *Bank of United States*, 9 Wheat. 738.
Bell et al. v. *Hood et al.*, 90 Law Ed. 758.

The opinion of the state court does not discuss said allegations in terms. Nevertheless, it declares that it considered, and of course decided, all the assignments of error (820), which included the error of the court in denying to Mrs. Moffett her federal rights as above alleged. These questions are therefore as much before this Court as they were before the state Supreme Court (*Truax* v. *Corrigan*, 257 U. S. 312).

In Section 61, Robertson and Kirkham's Jurisdiction of the Supreme Court of the United States, page 109, it is said:

> "61. Express Decision of Federal Question by State Court Not Required.

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Actual decision of the federal question in terms by the state court is not required; it is sufficient that the federal question was fairly presented by the record, was necessary to a determination of the cause, and that no adequate nonfederal ground of decision appears. Federal rights are denied as well by a refusal of the state court to decide questions presented, as by an erroneous decision of them" (citing cases).

Chapman v. *Goodnow's Adm'r*, 123 U. S. 540, 548, 8 Sup. Ct. 211, 31 L. Ed. 235.
Bell's Gap R. Co. v. *Pennsylvania*, 134 U. S. 232, 236, 10 Sup. Ct. 533, 33 L. Ed. 892.
Chicago Life Ins. Co. v. *Needles*, 113 U. S. 574, 579, 5 S. Ct. 681, 28 L. Ed. 1084.
Erie R. Co. v. *Purdy*, 185 U. S. 148, 154, 22 S. Ct. 605, 46 L. Ed. 847.
Roby v. *Colehour*, 146 U. S. 153, 159, 160, 13 S. Ct. 47, 36 L. Ed. 922.
Dewey v. *City of Des Moines*, 173 U. S. 193, 199, 19 S. Ct. 379, 43 L. Ed. 665.
Dorchy v. *Kansas*, 272 U. S. 306, 308, 309, 47 S. Ct. 86, 71 L. Ed. 248.
Lawrence v. *State Tax Commission of Mississippi*, 286 U. S. 276, 282, 52 S. Ct. 556, 76 L. Ed. 1102, 87 A. L. R. 374.

Appellees attempted to find comfort in *Missouri ex rel.* v. *Taylor*, 266 U. S. 200 (see their printed statement opposing jurisdiction, p. 24). But that case holds directly against their contention.

They failed to call attention to the fact that the federal statute there involved *made no provision concerning the remedy*, and further specifically provided that it should *not change any remedy or right of action* under existing law. Thus:

"Provided, that nothing in this section shall deprive any holder of such receipt or bill of lading *of any remedy* or *right of action* which he has under existing law."

The opinion in that case points out that Congress *did not provide a federal remedy,* saying, l. c. 208:

"It dealt solely with the substantive law • • • it made no provision concerning the remedy."

This Court then further said, l. c. 209:

"No peculiarity of state procedure will be permitted to enlarge or abridge a substantive federal right. *Central Vermont R. Co.* v. *White,* 238 U. S. 507, 511, 59 L. Ed. 1433, 1436, 35 Sup. Ct. Rep. 865, Ann. Cas. 1916B, 252, 9 N. C. C. A. 265; *Atlantic Coast Line R. Co.* v. *Burnette,* 239 U. S. 199, 60 L. Ed. 226, 36 Sup. Ct. Rep. 75, 17 N. C. C. A. 144; *New Orleans & N. E. R. Co.* v. *Harris,* 247 U. S. 367, 371, 62 L. Ed. 1167, 1170, 38 Sup. Ct. Rep. 535; *Yazoo & M. Valley R. Co.* v. *Mullins,* 249 U. S. 531, 63 L. Ed. 754, 39 Sup. Ct. Rep. 368. But to enforce a claim by subjecting property within the state to its satisfaction, through attachment proceedings, does not enlarge the substantive right."

The fact that Mrs. Moffett relied upon the Federal Constitution and Civil Rights Acts as the law authorizing the remedy which she sought is shown by the record in this case from the beginning. This appears from the foregoing allegations of her pleading, by assignments of error in the state court, and by the following from her jurisdictional statement, brief and all the motions and suggestions filed.

In appellants' jurisdictional statement (p. 3 printed copy) attention is called to the fact that appellants'

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pleading showed Mrs. Moffett's reliance on said statutes, and on page 5 thereof, after allegation as to denial of constitutional rights, it is stated that appellees instituted

> "• • • fictitious suits for $2,539,366.80 (268), intentionally kept pending since 1930 for the purpose of injuring appellants by depriving them of the rights secured to them by the Acts of Congress known as the Civil Rights Acts, R. S. 1979, 1980 and 1981" *et seq.*

On page 10 is the statement:

> "As the action in the state court was based on appellants' right to recover on Sections 1979, 1980 and 1981, U. S. R. S. (Secs. 43, 47 and 48, Title 8, U. S. C.), supplementing the constitutional provisions and Treaty, the question presented to the state court was necessarily a question of federal law within the rule stated in *First National Bank* v. *Anderson,* 269 U. S. 341, l. c. 346."

On page 11 it is said:

> "Denial of the rights guaranteed by Section 1 of the XIVth Amendment and R. S. 1979, 1980 and 1981, same being Sections 43, 47 and 48, Title 8, U. S. C. (225, 287-288), authorized appellants to institute the action at law in the state court to recover damages for the resulting loss (*Wiley* v. *Sinkler,* 179 U. S. 58; *Swafford* v. *Templeton,* 185 U. S. 487)."

In calling attention to the fact that the action was based on said Civil Rights Acts, it appears on page 14 that it is stated:

> " 'Such state statutes became as ineffective, both as to rights and *remedies,* as they would have been had they been specifically repealed by the state.' "

On pages 14-15 is the following:

> "This consideration as to the questions here involved brings this case within the class of controversies concerning rights created by the Constitution and laws of the United States, rather than those not created by the Constitution or laws of the United States, but which may or may not involve a federal question, as outlined in *Swafford* v. *Templeton, supra.*"

On page 15 it is said, after reference to *Equitable Life Assur. Soc.* v. *Brown*, 187 U. S. 308:

> "There this court stated the rule which applies in this case, thus, l. c. 311: 'The power, however, to dismiss because of the want of substantiality in the claim upon which the assertion of jurisdiction is predicated, does not apply to cases where the subject matter of the controversy is *per se* and inherently federal. *Swafford* v. *Templeton*, 185 U. S. 487, 493.'"

This Court, by dismissing this case, also overruled said language in *Equitable Life Assur. Soc.* v. *Brown, supra*, or ignored it, just as it did its decision in the Wulf case, all contrary to the established law with reference to judicial precedents.

On page 17 appears the following:

> "Plaintiff, in two capacities, was held by this court to be entitled to recover damages for violation of the constitutional rights involved in that case (*Bell et al.* v. *Hood et al.*, 90 Law Ed. 758). And so appellant herein, in two capacities, is entitled to recover, since it is alleged and admitted that appellants' federal rights were violated, to her damage, in both capacities."

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On page 25 of appellants' brief opposing motion to dismiss is the following:

> "This court has never permitted the Missouri Supreme Court to construe a federal law so as to prevent its application in the way Congress intended (*Pryor* v. *Williams*, 254 U. S. 43), nor any other state (*C. & O. Ry. Co.* v. *Kuhn*, 284 U. S. 44).
>
> Nor will it permit a state statute to be applied by a federal court to cut down federal rights (*Holmberg* v. *Armbrecht*, 90 Law Ed. 590).
>
> Section 43, Title 8, U. S. C., created rights which the state could neither cut down nor destroy."

On page 72 of the same brief:

> "The point to be determined in this case on this question is: Which law governs? Of course, the conclusion must be that the supreme law governs. For this court has never permitted Missouri, or any other state, to deny federal rights to any person by virtue of any state law when it came in conflict with federal statute, Treaty or Constitution."

In response to appellees' motion to strike, appellants say, p. 16:

> "The Civil Rights Statutes (R. S. U. S. 1979, 1980 and 1981), supplementing the Constitution, authorized Mrs. Moffett to bring the action in the state court in every capacity in which she had sustained injury. In disobeying the rules of construction made obligatory upon the state court by R. S. U. S. 1 (Section 1, Title 1, U. S. C.), and by Section 652, R. S. Mo. 1939, the state court erred in failing to construe said Civil Rights Statutes as required by such construction statutes, and erred in dismissing Mrs. Moffett's action on the ground of misjoinder of parties plaintiff, and thus and thereby denied appellants the rights, privileges and immunities secured by the provisions of

the Constitution, laws and Treaty referred to in the record herein.

Picking et al. v. *Pennsylvania R. Co. et al.*, 151 Fed. (2d) 240.
Bell et al. v. *Hood et al.*, 90 Law Ed. 758.
Georgia v. *Pennsylvania R. Co.*, 324 U. S. 439."

In the suggestions in support of appellants' motion concerning printing, page 9, it is said:

"On page 4 of appellees' reply they say that appellants never claimed the right to sue jointly until appellees' statement opposing jurisdiction suggested that appellants make such claim.

This is a most singular contention. To begin with, the physical fact that appellees devoted many pages to the futile contention that appellant could not sue in both capacities under the federal law, indicates that appellants must have made the claim somewhere. The question is—where? Appellants' pleading first raised said question. It is still alive.

The allegations of the fifth amended petition, as amended, in paragraph 19 thereof (224-225), refers to the deprivation of the rights guaranteed to appellants as to privileges and immunities, due process and equal protection of the laws, including Sections 51 and 52 of Title 18. It is there alleged that appellees: '* * * by reason of the injury thus caused plaintiff, became liable to said plaintiff under and by virtue of Sections 43, 47 and 48, Title 8, United States Code, the protection of which Constitution and statutory provisions the plaintiff here and now invokes."

And on page 4 of appellants reply to appellees' typewritten motion to strike, the concluding paragraph reads:

"*Burt* v. *City of New York*, 156 Fed. (2d) 791, (C. C. A. 2) agrees with the decision in *Picking et al.* v. *Pennsylvania R. Co. et al.*, 151 Fed. (2d) 240 (C. C. A. 3).

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Those decisions are in conflict with the decision of the Supreme Court of Missouri in this case, in holding that Mrs. Moffett has no right to recover under the Civil Rights Acts, and establish that if the conflict is to be settled by this court, the record must be printed, and appellees' motion to strike be denied."

In addition to the foregoing, it appears from the fifth amended petition (299-308) that appellees admitted that appellants' cause of action, as reflected in the allegations, was based upon appellees' violation of the rights secured to her by the XIVth Amendment and by the Civil Rights Acts. We quote the admissions made by appellees included in the 5th amended petition and reproduced in our jurisdictional statement, page 9:

"The petition charges that by reason of false and perjured testimony and the corruption of the trial judge, plaintiff was deprived of her property in violation of Section 1 of the 14th Amendment to the Constitution of the United States. • • • The petition further charges that by reason of the conspiracy and the corruption of the court, plaintiff was denied the rights secured to her by the Constitution of the United States 'and especially by the said provisions of the 14th Amendment to the Constitution of the United States, and by the provisions of Sections 51 and 52 of Title 18 • • • and that said defendants, by reason of the injury thus caused plaintiff, became liable to said plaintiff under and by virtue of Section 43, Title 8.'"

Appellees' said admission discloses that appellants' case was based upon a variety of denial of due process, equal protection and privileges and immunities which has always been regarded as the most iniquitous variety of denial of fundamental rights. In this connection we quote from

page 461 of Vol. LV of Beveridge's Life of Marshall, wherein he quotes the following language of the Chief Justice:

> "I have always thought, from my earliest youth till now, that the greatest scourge an angry Heaven ever inflicted upon an ungrateful and a sinning people, was an ignorant, a corrupt, or a dependent judiciary. (Marshall.)"

From the above and foregoing it is apparent that appellants have made the contention from the beginning, in their petition, assignments of error, their jurisdictional statement, brief, response and various motions, that her rights are governed by the federal law, and that the alleged and nonexisting state law cannot properly control this case.

It is evident that this contention of appellants has been overlooked by the court, for otherwise the *per curiam* opinion could not have been rendered herein.

But, even had the question on which the state court decided the case been a purely nonfederal ground, yet that rule, as to a nonfederal ground as heretofore applied in this Court, has no application to this case for the reason that under Section 16 of the new Code of Civil Procedure (Laws Missouri 1943, pages 360-361) a reversal of this case would merely necessitate the institution of a new suit by Mrs. Moffett in both capacities in the state court under the provisions of Section 16 of said Code.

And so this case is not a case where the erroneous decision of the federal question in this case by the state court could not be changed by a reversal by this Court. The judgment of reversal would save Mrs. Moffett the expense of instituting a new suit in the same capacities, for, on reversal, the state court could not render the same judg-

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ment. And, since the appellees admitted the facts alleged by Mrs. Moffett, does it not necessarily follow that it would be unjust to refuse to take jurisdiction and to enter that judgment of reversal which the admissions of the appellees necessitate under the decisions of Judge Learned Hand in *Burt* v. *New York*, 156 Fed. 791, and under the decision of Judge Biggs in *Picking et al.* v. *Railroad et al.*, 151 Fed. (2d) 240, and of this Court in the Wulf case.

The only reason for the failure to reverse, for error in ruling on the federal questions involved, in a case where the Constitution and laws of the United States are the basis of the plaintiff's claim, as here, is that originally given in *Murdock* v. *Memphis*, 20 Wall. 590, l. c. 635, and which reason has been reiterated in *Flournoy* v. *Wiener*, 321 U. S. 253, where Chief Justice Stone indicated that the court would take jurisdiction and reverse were it not for the fact that the opinion on reversal would be merely advisory and would accomplish no purpose. We reproduce the language of Chief Justice Stone on this subject in that case, l. c. 261-262:

> "Any determination which we might make of the Fifth Amendment question would thus leave unaffected the state court's judgment brought here for review. Our opinion on that subject would be advisory only, since there is nothing before us on which we could render a decision that would have any controlling effect on the rights of the parties. Hence the case stands in the same posture as those in which we have repeatedly held, that where the judgment of a state court rests in part on a nonfederal ground adequate to support it, this court will not consider the correctness of the decision which the state court also made of a federal question otherwise reviewable here. * * * In such a case this court has said that it will not enter 'a useless and profitless reversal' 'where the same judgment will be rendered by the

court below, after they have corrected the error in the federal question.' *Murdock* v. *Memphis*, 20 Wall. (U. S.) 590, 634, 635, 22 L. Ed. 429, 443, 444. Compare *Pugh* v. *McCormick*, 14 Wall. (U. S.) 361, 374, 20 L. Ed. 789, 791. For like reasons we have refused to answer questions certified to us by a lower federal court where it appears that the answer cannot affect the result. * * *

Appellant having assigned as error the decision of the Louisiana Supreme Court holding the Federal Act invalid, the case is properly an appeal, and appellant could have included in his assignments of error any other denial of federal right whether or not capable in itself of being brought here by appeal. *Prudential Ins. Co.* v. *Cheek*, 259 U. S. 530, 547, 66 L. Ed. 1044, 1055, 42 S. Ct. 516, 27 A. L. R. 27."

This Court has overlooked the rule that it will take judicial notice of a change in the law of the state under the facts in this case (*Vandenbark* v. *Owens Illinois Glass Co.*, 311 U. S. 538).

In the dissenting opinion, in *Flournoy* v. *Wiener, supra*, by Mr. Justice Frankfurter, with Mr. Justice Roberts and Mr. Justice Jackson concurring, it is pointed out that where the decision of an alleged state question also involves a federal question, then that this Court has jurisdiction, saying, l. c. 270-271-272:

"9. If a federal claim was drawn in question in *Smith* v. *Kansas City Title & T. Co.*, 255 U. S. 180, 65 L. Ed. 577, 41 S. Ct. 243, *supra*, and *Standard Oil Co.* v. *Johnson*, 316 U. S. 481, 86 L. Ed. 1611, 62 S. Ct. 1168, *supra*, it was not less drawn in question in this case. If the earlier two decisions are to continue to stand, I am unable to make a differentiation between them and the record before us. Much is to be said for the reasoning of Mr. Justice Holmes in the Kansas City Title & T. Co. case in urging that the

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incorporation of a federal act into a state law nevertheless makes the suit, for purposes of our jurisdiction, one arising under the state and not under the federal law. But his view was rejected. In the recent Standard Oil Co. case we had opportunity to adopt his view and reject that of the court in the Kansas City Title & T. Co. case. Instead, we unanimously applied the reasoning of the Kansas City Title & T. Co. case that where a decision under state law necessarily involves the construction or validity of federal law the determination of such federal law in the application of state law gives rise to a federal question for review here."

Herein the construction of the Civil Rights Acts was involved. As the Constitution gives corporations and artificial persons its protection (see *Smyth* v. *Ames*, 169 U. S. 466), as well as to citizens of the United States, there is no merit in the contention of the appellees that the constitutional protection was not given to Mrs. Moffett as executrix. Since it was, the Civil Rights Statutes were statutes of which Mrs. Moffett as executrix, and an individual, could avail herself. It necessarily follows that she was protected by the federal statutes, and the question involved was whether or not under the federal statutes she had a right to recover in both capacities. This necessitated a construction of these federal statutes, and the issue was tendered by the petition (224-225, 287-288). And the protection of the Constitution and of the Civil Rights Statutes, both civil and criminal, were specifically invoked (225).

As pointed out in the dissenting opinion in *Flournoy* v. *Wiener, supra,* l. c. 274, when it uses the following language:

> "* * * to throw out the case because 'Fourteenth Amendment' was not written is to make our jurisdiction the slave of words."

We also think the language of paragraph 12 of the dissenting opinion applies to this case, thus:

> "12. If the decision below can really be said to rest on a nonfederal ground, no assignment of errors could cure the defect. But it does not rest on a nonfederal ground. It rests on a federal ground—the federal ground that is written on almost every page of the record,"

as here.

III.

The Civil Rights Acts authorized Mrs. Moffett to bring the action in each and every capacity in which she was injured and damaged. And the action of the state court in dismissing the case on the ground of misjoinder of parties plaintiff, and of this Court in dismissing the appeal herein, deprived Mrs. Moffett of the federal rights given to her by said Acts.

This Court, in countless cases, has stated that Congress having declared when, how far, and to whom, carriers shall be liable on account of accidents in the specified class under the Federal Employers' Liability Act, such liability can neither be extended nor abridged by common or statutory laws of the state.

Said statement by this Court as to the Act of Congress there involved applies to the Civil Rights Acts here involved. And in this connection we reproduce Section 43, U. S. C., Title 8, as an illustration:

> "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any state

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or territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

In *New York Central R. R. Co.* v. *Winfield*, 244 U. S. 147, it is held that the state could not, by its legislature, supplement the Act of Congress for any purpose, quoting from *Prigg* v. *Pennsylvania*, 16 Pet. 539, as follows, l. c. 153:

"'* * * if Congress have a constitutional power to regulate a particular subject, and they do actually regulate it in a given manner, and in a certain form, it cannot be that the state legislatures have a right to interfere; and, as it were, by way of complement to the legislation of Congress, to prescribe additional regulations, and what they may deem auxiliary provisions for the same purpose. In such a case, the legislation of Congress, in what it does prescribe, manifestly indicates that it does not intend that there shall be any farther legislation to act upon the subject matter. Its silence as to what it does not do is as expressive of what its intention is as the direct provisions made by it.'"

In *American Ry. Exp. Co.* v. *Levee*, 263 U. S. 19, the carrier was sued under the same Carmack amendment involved in *Missouri ex rel.* v. *Taylor*, 266 U. S. 200. The bill of lading contained a contract limiting liability to $50.00, but the state court applied the state law and held that the burden was on the carrier to, l. c. 20:

"* * * prove that the loss or damage had been occasioned by accidental and uncontrollable events,"

and gave a judgment in excess of $860.00. This Court held the limitation was applicable under the federal law, and that, l. c. 21:

> "The effect of the stipulation could not have been escaped by suing in trover, and laying the failure to deliver as a conversion, if that had been done. *Georgia, F. & A. R. Co.* v. *Blish Mill. Co.*, 241 U. S. 190, 197, 60 L. Ed. 948, 952, 36 Sup. Ct. Rep. 541. No more can it be escaped by a state law or decision that a failure to deliver shall establish a conversion unless explained. The law of the United States cannot be evaded by the forms of local practice."

In *Davis* v. *Weschler*, 263 U. S. 22, a Missouri rule of procedure was applied, holding that, under the decisions, the question of venue was waived by appearance. But this Court held that a rule of state practice could not defeat a federal right. At l. c. 24, the Court said:

> "We are of opinion that the judgment must be reversed. Whatever springes the state may set for those who are endeavoring to assert rights that the state confers, the assertion of federal rights, when plainly and reasonably made, is not to be defeated under the name of local practice. * * * The state courts may deal with that as they think proper in local matters, but they cannot treat it as defeating a plain assertion of federal right. The principle is general and necessary. *Ward* v. *Love County*, 253 U. S. 17, 22, 64 L. Ed. 751, 758, 40 Sup. Ct. Rep. 419. If the Constitution and laws of the United States are to be enforced, this court cannot accept as final the decision of the state tribunal as to what are the facts alleged to give rise to the right or to bar the assertion of it even upon local grounds. *Creswill* v. *Grand Lodge, K. P.*, 225 U. S. 246, 56 L. Ed. 1074, 32 Sup. Ct. Rep. 822. This is familiar as to the substantive law, and for the same reasons it is necessary

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to see that local practice shall not be allowed to put unreasonable obstacles in the way. See *American R. Exp. Co.* v. *Levee*, decided this day (263 U. S. 19, *ante*, 140, 44 Sup. Ct. Rep. 11)."

Section 43, Title 8, U. S. C., authorizes recovery from appellees for the acts alleged by:

1st: "• • • any citizen of the United States."
2nd: "• • • or other person within the jurisdiction thereof."

in

1: "• • • an action at law."
2: "• • • suit in equity."
3: "• • • or other proper proceeding for redress."

The wrongs for which recovery may be had are:

"• • • deprivation of any rights, privileges, or immunities secured by the Constitution and laws."

The liability is "to the party injured" only in one "action at law," etc.

Mrs. Moffett is a citizen of the United States, and also executrix of her husband's estate.

As executrix, she is not a citizen of the United States.

As a citizen of the United States, she is not an executrix.

As executrix she is an "other person within the jurisdiction thereof" (United States).

Did Congress, by said language, intend that Mrs. Moffett, who sustained injuries in both capacities by the same overt acts of appellees, pursuant to the same conspiracy, must bring separate actions therefor?

The proper interpretation of the language demonstrates that Congress never had any such intention.

The word "or," when used to connect a series of words in the permission or the prohibition of an action, should be construed to mean "and" when necessary to make the statutes express the true legislative intent. (*United States* v. *Fisk*, 3 Wall. 444, l. c. 447.)

The recovery can be had for the "deprivation of any rights."

Of course, the "any rights" mentioned would include any rights which Mrs. Moffett had, either as a citizen of the United States, or in her capacity as executrix. Not only so, but she could couple in her suit her right to recover as a citizen of the United States for the "• • • deprivation of any • • • privileges, or immunities," secured by the XIVth Amendment, which only apply to her capacity as such citizen (*Paul* v. *Virginia*, 8 Wall. 168), as well as for property loss which she sustained in her capacity as a "person" (executrix) and not as such citizen.

That the Congress intended that this recovery could be had in a single action is demonstrated by the provision that the guilty persons shall be liable, not to the citizen of the United States as such, nor to the other person mentioned in the statute as such, but to "the party injured"—not in a multitude of actions, but in "an action at law," or in a "suit in equity," or "other proper proceeding for redress."

It is manifest that this statute expresses the same intent as to one "action," or "suit" or "proceeding" which this Court attributed to Congress in *St. Louis, I. Mtn. & S. Ry. Co.* v. *Craft*, 237 U. S. 648. In construing the Act of Congress there involved, which authorized recovery for the injury which deceased could have recovered had he lived, in connection with the provision authorizing recovery for the loss sustained by his death

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while employed in interstate commerce, this Court held that the suit involved two causes of action, saying, l. c. 658:

> "Although originating in the same wrongful act or neglect, the two claims are quite distinct, no part of either being embraced in the other. One is for the wrong to the injured person, and is confined to his personal loss and suffering before he died, while the other is for the wrong to the beneficiaries, and is confined to their pecuniary loss through his death. One begins where the other ends, and a recovery upon both in the same action is not a double recovery for a single wrong, but a single recovery for a double wrong."

This was followed in *Baltimore & Ohio S. W. R. Co.* v. *Carroll*, 280 U. S. 491, l. c. 495:

> "The statute, it is true, provides that 'there shall be only one recovery for the same injury'; but this has the effect of not merging the two rights into a single cause of action, but of limiting the personal representative 'to one recovery of damages for both, and so to avoid the needless litigation in separate actions of what would better be settled once for all in a single action.'"

Why should the Congress provide for such recovery "in an action at law" if it meant *two* actions at law?

The word "party" in said Section 43 applies to Mrs. Moffett for the loss resulting from the deprivation of her privileges and immunities under the XIVth Amendment as a citizen of the United States; and also applies to her in her individual capacity, wherein she has been deprived by appellees in violation of said Acts of Congress of the property which would have been hers as

sole beneficiary under her husband's will had appellees not violated her federal right by destroying same. And the word "party" also applies to Mrs. Moffett by the use of the words "or other person" in her capacity as executrix.

Section 47, Title 8, U. S. C., provides that if one or more conspirators do, or cause to be done,

> "* * * any act in furtherance of the object of such conspiracy, whereby another is injured in his *person* or *property*, or deprived of having and exercising *any right or privilege of a citizen of the United States*,"

that then

> "* * * the party so injured or deprived may have *an action for the recovery of damages* occasioned by such injury or deprivation,"

Does not said section expressly authorize "an action for damages" in all capacities?

Said language necessarily contemplates that a wrong whereby another is injured in his *person* or *property* specifically contemplates the right of the party so injured or deprived to include himself in every capacity in which he is so injured or deprived, whether he be an individual or an executor or administrator, or merely a citizen of the United States. And it explicitly provides that for the injury to another, "*either* in his *person* or *property*" (which language, of course, refers to different capacities), such other may be an executor who has sustained injury to or loss of the property held as executor; and he may also be an individual who sustains the injury to his person. But the right to recovery is limited to "an action for the recovery of damages occasioned by such injury or deprivation." That language excludes *two* actions for

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damages, and authorizes the joinder of the party injured in both capacities.

And, since there could be no deprivation of the privileges and immunities (which are limited to citizens of the United States) by an executor, whose loss could only be a property loss resulting from conversion or injury to the assets, we have a situation where the Congress, in said section, contemplates recovery by any such person in any capacity in which he sustains personal injury, property loss, or loss of privileges and immunities, and limited it merely to one action for damages, for the section says:

> "• • • the party so injured or deprived may have an action for the recovery of damages, occasioned by such injury or deprivation,"

It is manifest that the last quoted language has exactly the same meaning as the language contained in the amended Federal Employers Liability Act, authorizing recovery in the same action for two causes of action by providing that

> "• • • there shall be only one recovery for the same injury."

And so we have a situation to which the statement in the Craft case, *supra*, applies and authorizes recovery by the person so injured in every capacity in the one action for damages therein mentioned:

> "• • • and so to avoid the needless litigation in separate actions of what would better be settled once for all in a single action."

This circumstance necessarily makes the decision of this Court in *M. K. & T. R. Co.* v. *Wulf*, 226 U. S. 570, exact

authority for the proposition that the decisions construing the Federal Employers Liability Act, which provides a remedy, apply to these two sections (43 and 47, Title 8 U. S. C.) which also provide a remedy.

The Employers Liability Act provides a remedy for those injured by negligence for which they were entitled to recover under the existing law before the enactment of the Employers Liability Act in every State.

By the same token the Civil Rights Acts provide a remedy for the recovery of those damages in all capacities for which the injured citizen or person had a right to recover without the aid of the Civil Rights Acts. (See *Scott* v. *Donald*, 165 U. S. 58; *Bell et al.* v. *Hood et al.*, 90 L. Ed. 758.)

The authorities cited in support of the per curiam opinion have no application to this case, for the reason that both of said decisions dealt with cases based wholly on state law, and hence are no authority for the dismissal of an appeal wherein federal questions, which are *per se* and inherently federal, are involved.

That is to say, Mrs. Moffett's right to recover herein is based on the Civil Rights Acts and not on the state law.

And so the statement of this Court in *Equitable Life Assur. Soc.* v. *Brown*, 187 U. S. 308, should apply herein rather than the inapplicable statements of the law in those cases. We respectfully submit that the following excerpt from said opinion is the correct statement of the applicable law in this case, l. c. 311:

> "The power, however, to dismiss, because of the want of substantiality in the claim upon which the assertion of jurisdiction is predicated, does not apply to cases where the subject matter of the controversy is *per se* and inherently federal. *Swafford* v. *Templeton*, 185 U. S. 487, 493."

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IV.

Burt v. _City of New York et al._, 156 Fed. (2d) 791 (C. C. A. 2), and _Picking et al._ v. _Pennsylvania R. Co. et al._, 151 Fed. (2d) 240 (C. C. A. 3), construe and apply Sections 43 and 47, Title 8, U. S. C. A., holding that under the decisions of this Court said statutes are valid, and that statutes of a state cannot operate to deprive Mrs. Moffett of the rights given by the federal statutes.

Appellants' brief was filed in the Supreme Court of Missouri on August 17, 1945. *Picking et al.* v. *Pennsylvania R. Co. et al.*, 151 Fed. (2d) 240 (C. C. A. 3), which was published in the advance sheets on November 26, 1945, could not have been included therein. And the conclusion to be drawn from its opinion is that it concluded that the action could not be maintained under the Civil Rights Act.

In *Burt* v. *City of New York*, 156 Fed. (2d) 791, the decision of the Circuit Court of Appeals for the second Circuit by Judge Learned Hand was published in the advance sheets for October 7, 1946. So that neither the Missouri Supreme Court, nor this Court, had the benefit of the opinion in *Burt* v. *City of New York*.

In both the Picking and the Burt cases the questions involved were the rights of litigants to pursue the remedy provided by Sections 43 and 47 of the Civil Rights Acts for injuries to the person, or deprivation of property rights.

Both opinions refer to the questions which were settled by opinions of this Court with reference to the right to recover under the Civil Rights Acts.

The Picking case dealt exclusively with R. S. 1979, or Section 43, Title 8, U. S. C. In reversing the district court the Court of Appeals called attention to the decision

in a number of cases which held that the Federal Rights Acts did not give the rights asserted in the Picking petition in that case. It then referred to *United States* v. *Classic*, 313 U. S. 299, and *Screws* v. *United States*, 325 U. S. 91, pointing out that (l. c. 248):

> "The phrase 'under color of any statute • • • ' employed in R. S., Sec. 1979, must be construed as was the phrase 'under color of any law' in the Screws case."

And then states, l. c. 249:

> "As we read R. S., Sec. 1979, in the light of the Screws decision we are compelled to the conclusion that Congress gave a right of action sounding in tort to every individual whose federal rights were trespassed upon by any officer acting under pretense of state law."

And then stated:

> "It follows that if the plaintiffs in the case at bar were deprived of a federal right by state officials or officers acting 'under color of any law'—or as may be stated more aptly in the instant case, 'under color of any statute • • • of any state'—these officials must respond in damages to the plaintiffs as prescribed by R. S., Sec. 1979."

And concluded:

> "The plaintiffs have stated a valid cause of action rising under R. S., Sec. 1979, insofar as the individual defendants are concerned."

In *Burt* v. *New York*, Judge Learned Hand states, l. c. 791-792:

> "Whatever may have been true before, it seems to us that, since the decision of the Supreme Court in

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Snowden v. *Hughes*, 321 U. S. 1, 64 S. Ct. 397, 88 L. Ed. 497, such allegations will support an action under Sec. 43 and Sec. 47 (3) of Title 8, * * *"

Further discussing the effect of *Snowden* v. *Hughes*, 321 U. S. 1, in *Burt* v. *City of New York*, 156 Fed. (2d) 791, Judge Learned Hand said, l. c. 792:

"* * * but the decision definitely settled it, that, if a complaint charges a state officer not only with deliberately misinterpreting a statute against the plaintiff, but also with purposely singling out him alone for that misinterpretation, it is good against demurrer."

And in the Burt case, discussing the effect of the Screws decision, 325 U. S. 91, Judge Hand said, l. c. 792:

"Further, if there remained any longer doubt whether the act of a state officer is the act of the state, if done under the pretended justification of a statute, that doubt was laid by *Screws* v. *United States*, 325 U. S. 91, 107-112, 64 S. Ct. 1031, 89 L. Ed. 1495. It is true that that case involved Sec. 52 of Title 18, U. S. C. A.—the criminal sanction for the 'Civil Rights Act'; but, as Judge Biggs observed in *Picking* v. *Pennsylvania R. Co.*, 3 Cir., 151 F. (2d) 240, 248, the phrase 'under color of any statute' occurs in both Sec. 43 of Title 8, U. S. Code, and Sec. 52 of Title 18, and must be taken as having the same meaning in each. See also *Hague* v. *Congress of Industrial Relations*, 307 U. S. 496, at page 510, 59 S. Ct. 954, 83 L. Ed. 1423."

Judge Hand further said, l. c. 792:

"Our conclusion that the amended complaint stated a cause of action is confirmed by *Picking* v. *Pennsylvania, supra.*"

Holding that a procedural remedy provided by the state for the wrong done did not diminish the plaintiff's right under the Civil Rights Acts, the court said, l. c. 793:

> "However that may be, clearly it is not an effective substitute for the damages which the plaintiff may have suffered from the subordinate officers whom he has made defendants, or from the Board itself. The risk of a recovery against them for these does on its face appear substantial; and indeed in *Picking* v. *Pennsylvania R. Co., supra* (3 Cir., 151 F. (2d) 240), it was held that the 'Civil Rights Act' actually tolled the privilege of a judge."

It thus appears that in *Burt* v. *New York, supra,* Judge Hand, with the concurrence of the entire court, has expressly ruled that a state procedural act can not be substituted for the action for damage provided by the Civil Rights Acts as a remedy for the wrong.

The same principle applies in this case to prevent the purported but nonexisting rule of state law from preventing a recovery by Mrs. Moffett in both capacities against appellees which was held in the Picking case not to relieve one of the appellees in that case from the liability imposed upon him by his violation of the Civil Rights Acts herein involved. It was there said, l. c. 251:

> "One further point, however, arises in respect to Governor James. Statutes of Pennsylvania, the Act of April 9, 1929, P. L. 177, Art. V, Sec. 512, and Art. IX, Sec. 902 of the same Act, 71 P. S. Pa., Secs. 192 and 292, provide that the Department of Justice of Pennsylvania shall have the power and duty to furnish legal advice to the Governor of Pennsylvania concerning any matter arising in connection with the exercise of his official powers; that if the Chief Executive, having requested and received legal advice from the Department of Justice, bases his official conduct

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upon such advice, 'he shall not be in any way liable for so doing.' • • • Counsel for Governor James contend that the provisions of these statutes relieve him from any liability in the instant case. We cannot agree since the cause of action arises under the Civil Rights Act. We can find no case in point, but the language employed by the Supreme Court in *Sola Electric Co.* v. *Jefferson Co.*, 317 U. S. 173, 176, 63 S. Ct. 172, 174, 87 L. Ed. 165, is suggestive of the decision which we should reach. It is as follows: 'When a federal statute condemns an act as unlawful the extent and nature of the legal consequences of the condemnation • • • are • • • federal questions, the answers to which are to be derived from the statute and the federal policy which it has adopted. To the federal statute and policy, conflicting state law and policy must yield.'

• • • • • • •

"Obviously, if a state statute purports to confer immunity upon an official of a state who has violated the provisions of the third Civil Rights Act by depriving an individual of a federal right, the state has invaded the liberties of the individual which are protected by the Fourteenth Amendment. It follows that the court below was in error in dismissing the complaint as to Governor James."

By the same token, the alleged procedural statute could ot be considered by the state court, or this Court, and pplied for the purpose of preventing a recovery by Mrs. loffett in every capacity in which she was damaged. In ther words, when a litigant chooses a state court to nforce his or her federal rights under the remedial statte enacted by Congress to enforce said federal rights, he federal remedial statutes supersede all state laws in onflict therewith.

V.

Had Mrs. Moffett instituted this action in one capacity to the exclusion of the other, the decision of the Missouri court for or against her would have prevented another action in the other capacity, and so she was entitled, as against a demurrer on the nondemurrable ground of misjoinder of parties plaintiff, to recover in the state court in both capacities.

Appellees, on page 147 of the appendix to their statement opposing jurisdiction, submitted the following to this Court:

> "(1) An examination of plaintiff's amended bill disclosed that the plaintiff, Louise McGrew Moffett, as sole beneficiary of Thomas S. Moffett, deceased, was a party and filed pleadings in the suit (No. 7374) in the District Court of Harper County. Therefore, the judgment rendered in such suit was binding upon her in her capacity as executrix of the Thomas S. Moffett estate. See *Chicago, R. I. & P. Ry. Co.* v. *Schendel,* 270 U. S. 611, 618, 46 S. Ct. 420, 70 L. Ed. 757, 53 A. L. R. 1265."

If said statement correctly declares the law (which, as to the void Kansas judgment, we deny), there could be no misjoinder.

The Missouri court in *In Re Thomasson's Estate,* 196 S. W. (2d) 155, in discussing the question before the court, pointed out that an administratrix of an estate was bound by the judgment in her individual capacity. The court held that, in *Rossi* v. *Davis,* 345 Mo. 362, l. c. 383, she contended that a contest proceeding, l. c. 158:

> "• • • was prosecuted by her as *administratrix* and not *as an individual,* and, therefore, was not binding upon her *individually,* and did not violate the no-contest clause of the trust instrument. This contention

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was disallowed, the court considering that as administratrix she also represented herself as an heir and as an individual."

The Missouri court, in *Rossi* v. *Davis*, 345 Mo. 362, l. c. 383, adopted the following as Missouri law from the opinion of the illustrious Judge Bleakley of the Georgia court of last resort in *Fouche, Assignee, et al.* v. *Harison, Executor, et al.*, 78 Ga. 359, 410:

"Whoever heard that an executor has to make himself a party to his own bill in order to bind himself individually, or to give himself, as creditor, legatee or otherwise, the fruits of the decree to the extent of his personal interest in the same? Is it possible to doubt that on the present bill it would be competent to decree the proper disposition to be made of the legacies, whether to pay them out on the claims of creditors, or to hold them free from such claims? And how could the executor, as an individual, either shun the burden or be shorn of the benefit of any rightful decree on that subject that might be rendered? Unless we are wholly unfit to be judges on such a plain question, we are at a loss to understand why it should be considered a question at all. That no direct authority upon it has been produced must be due alone to the fact that legal evolution has not progressed far enough to develop a needless precedent for a necessary conclusion.

We think the reasoning of the Georgia court is sound and that it is sustained by *Corcoran* v. *Chesapeake & Ohio Canal Co.*, 94 U. S. 741, 745."

VI.

Rule 29 of the trial court was the law of the court (*Irrigation Co.* v. *Gildersleeve*, 174 U. S. 603, l. c. 608-609; *Meierhoffer* v. *Hansel*, 294 Mo. 195), binding parties, judge and court, and failure to obey it deprived Mrs. Moffett of the federal rights secured by Section 1 of the XIVth Amendment.

Mrs. Moffett is entitled to a rehearing in this case because the initial or original question shown by the record in this case is a federal question, to-wit: Whether or not a single state judge violated appellants' federal rights to notice and hearing, deciding the case on demurrer on the day that it was filed, in violation of its Rule 29 (402-403) and thereby rendering a judgment without notice or jurisdiction, contrary to the due process and equal protection provision of the XIVth Amendment.

That question was wholly overlooked by this Court, and this notwithstanding that this and the state court have decided that the rule of the court is the law of the court, and binding on each individual member of the court, and deprives him of discretion to disobey it—and to deny its protection to Mrs. Moffett was to deny to her the equal protection of the laws.

Rule 29 (402-403), adopted by the Circuit Court *en banc*, was binding on the single judge who acted on December 30, 1944. It reserved no discretionary power in him, and hence his act in sustaining said demurrers on said date was in direct conflict with the law as declared by this Court in *Rio Grande Irrigation Co.* v. *Gildersleeve*, 174 U. S. 603, l. c. 608-609, where this Court said:

> "There is a rule prescribed by the Supreme Court of the territory, in the following terms:
> 'No motion to set aside any finding or judgment rendered in vacation shall be entertained, unless it

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shall be filed and a copy thereof served upon the opposite party within ten days after the entry of such finding or judgment.'

As no discretionary power was reserved to the trial judge, he could not dispense with this rule of court. As was said in *Thompson* v. *Hatch,* 3 Pick. 512:

'A duly authorized rule of court has the force of law, and is binding upon the court as well as upon parties to an action, and cannot be dispensed with to suit the circumstances of any particular case. * * * The courts may rescind or repeal their rules, without doubt; or, in establishing them, may reserve the exercise of discretion for particular cases. But the rule once made without any such qualification must be applied to all cases which come within it, until it is repealed by the authority which made it.'"

The state court, in many decisions, had theretofore decided that to deny a litigant the benefit of the rule with reference to the particular question here involved was to violate his constitutional rights. See *Meierhoffer* v. *Hansel,* 294 Mo. 195.

In *Meierhoffer* v. *Hansel, supra,* at l. c. 202, the court said:

"The Circuit Court of Jackson County, at Kansas City, consists of nine divisions, and by statutes, Sections 2450 to 2454, inclusive, the judges are empowered to make rules and regulations for the trial of causes pending therein and, perforce of said statutes, such rules thus made become the law."

The court discusses the failure of an individual judge, both as assignment and trial judge, as in this case, to enforce the rules, including Rule 29 involved in this case. Judge Reeves, now a federal judge, writing the opinion of the Supreme Court of Missouri, said, l. c. 206:

> "It is apparent that the constitutional rights of the appellant were violated, as the processes of the law were not permitted to operate in his behalf, and the privileges and benefits of the law were denied to him."

Appellees claim that the notice provided by Rule 29 would not do Mrs. Moffett any good. Had the rule been complied with, then neither the trial court nor the Supreme Court could have sustained the demurrer because the new Code went into effect on the succeeding court day, and said new Code had repealed the law and went into effect on January 1, 1945.

And, in any event, Mrs. Moffett was entitled to call the court's attention, before it rendered a judgment, to the fact and the law that, within the meaning of the law, three demurrers had not been sustained because, as to defendant Kopp only two pending demurrers had been sustained and a record made sustaining a nonpending demurrer. And as to the other defendants, Judge Buzard's orders overruling their attacks on the first amended petition on the same ground of misjoinder of parties plaintiff were standing and not set aside when Judge Terte sustained demurrers to the same first amended petition, and thus undertook to exercise jurisdiction that he did not have, to-wit, appellate jurisdiction over Judge Buzard.

The trial court refused to permit appellants to present their contention with reference to the demurrer, and of course with reference to the judgment, in violation of Rule 29 (402-403), and thereupon and as a part of the same transaction applied Section 948, R. S. Mo. 1939, and its penalties against Mrs. Moffett without a hearing.

Appellants assigned as error the action of the trial court in so applying the penalties of said Section 948 without a hearing, evidence or argument (406) with reference to the

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basis for the application of said statute, which application operated to make said statute a bill of pains and penalties in this case, in violation of Section 10 of Article I of the Constitution on that subject.

Mrs. Moffett could only question that statute in the way in which it was applied to her herein, and to her disadvantage (*Dahnke-Walker Milling Co.* v. *Bondurant*, 257 U. S. 282). The following from that opinion discloses that this case is rightly here on appeal on that one ground alone, if on no other, for this Court said, l. c. 290:

> "Our conclusion on the jurisdictional question is that, as the state court applied and enforced to the plaintiff's disadvantage a state statute which the plaintiff seasonably insisted as so applied and enforced, was repugnant to the Constitution and void, the case is rightly here on writ of error."

The opinion of the state court recognized that the invalidity of the statute as applied was assigned as error on the ground of being repugnant to the Constitution, and decided the question, but in doing so it incorrectly stated the facts on which it based its decision, as hereafter shown.

This Court, in *Ancient Egyptian Arabic Order N. M. S.* v. *Michaux*, 279 U. S. 737, has declared the applicable rule, l. c. 744-745:

> "The right thus specially set up in the state court is a federal right. Whether it was denied or not given due recognition by the challenged decree, as affirmed, is a question on which the defeated claimants are entitled to invoke the judgment of this court, as is done in their petition for certiorari. And it is our province to inquire not only whether the right was denied in direct terms, but also whether it was denied in substance and effect by interposing a nonfederal ground of decision having no fair support."

Appellees claim that the notice would not do Mrs. Moffett any good. In this they are in error, for had the trial court complied with Rule 29 (402-403), neither it nor the Supreme Court could ever have sustained said demurrer on any ground for the reason that by the new Code, which went into effect the following court day and less than the two days required by the notice, the statute authorizing demurrers, even had it included the ground of misjoinder of parties plaintiff, and Section 948 were repealed, and could never have been enforced in this case.

And in any event, in *Coe* v. *Armour Fertilizer Works*, 237 U. S. 413, in discussing the question of lack of the notice provided by law upon the ground that it would not do any good anyhow, this Court said:

> "The fallacy of this is that it ignores the issue of law raised by the petition of plaintiff in error, and substitutes an issue of fact for which he was not summoned and which he has not consented to litigate. To one who protests against the taking of his property without due process of law, it is no answer to say that in his particular case due process of law would have led to the same result because he had no adequate defense upon the merits. *Rees* v. *Watertown*, 19 Wall. 107, 123, 22 L. Ed. 72, 77.
>
> Nor can extra-official or casual notice, or a hearing granted as a matter of favor or discretion, be deemed a substantial substitute for the due process of law that the Constitution requires. * * *
>
> 'This notice must be provided as an essential part of the statutory provision, and not awarded as a mere matter of favor or grace.' In *Roller* v. *Holly*, 176 U. S. 398, 409, 44 L. Ed. 520, 524, 20 Sup. Ct. Rep. 410, the court declared: 'The right of a citizen to due process of law must rest upon a basis more substantial than favor or discretion.' And in *Louisville & N. R. Co.* v. *Central Stock Yards Co.*, 212 U. S. 132,

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144, 53 Law Ed. 441, 446, 29 Sup. Ct. Rep. 246, it was said: 'The law itself must save the parties' rights, and not leave them to the discretion of the courts as such.' "

In *State ex rel. Pedigo* v. *Robertson*, 181 S. W. 987, the Missouri Supreme Court *en banc*, through the late Judge Faris, later an eminent judge of the United States Circuit Court of Appeals, in discussing the duty of the court to enforce this rule, stated, l. c. 988:

> " 'These rules apply to all persons, all cases, and all representatives of clients alike, and must be construed in one case just as they have been or will be in another, irrespective of the case, the parties or their counsel.'
>
> Subject to exceptions, none of which are here to the fore, the law as to the binding force and obligation upon the court of a rule of practice which such court adopts, in Cyc. is stated thus:
>
> 'There are numerous cases which declare that rules of court should be adhered to both by parties litigant and the court, in all cases which fall within them so long as they remain in force, and that the court has no power in a particular case, where no discretion is reserved, to suspend or modify any rule which it has made.' 11 Cyc. 743."

Division 1 of the State Supreme Court, in its opinion herein by Judge Clark, stated appellants' contention as follows:

> "Appellants contend: • • • *that he had no jurisdiction to pass on the demurrers without at least two days' notice to appellants under court rules;*"

Disposing of the question, the court said:

> "(4) The circuit court of Jackson County is a multiple judge court. Its rules provide that the court *en*

banc shall from time to time select one of the judges as presiding or assignment judge, whose duty it is to pass upon motions and demurrers, make up the issues and assign cases to the different divisions, including his own division. Two days' notice is necessary to call up a demurrer unless waived or a different time be fixed by the presiding judge. The demurrers to the fifth amended petition were filed on or before December 6, 1944. Then appellants filed a reply on the theory that the demurrers were really answers, which reply was after a hearing stricken out on respondents' motions. Then on December 30, 1944, with all parties present by counsel, the demurrers were presented to Judge Ridge. Appellants, by leave of court, withdrew paragraph 45 of their fifth amended petition, and respondents refiled their demurrers. Appellants requested at least two days' delay on the ground that the demurrers had just been filed. The court, in the exercise of proper discretion, denied this request. *Kuh* v. *Garvin*, 125 Mo. 547, 28 S. W. 847, loc. cit. 851. The withdrawal of paragraph 45, which related to a suit brought by respondent Kopp against Mrs. Moffett, in no way affected the point made in the demurrers as to misjoinder of parties plaintiff or failure to state a cause of action. We see no violation of the rules."

Rule 29 (402-403), the latest rule shown in the record, is complete in itself and contains nothing in it justifying the following from the above statement:

> "* * * unless waived or a different time be fixed by the presiding judge. * * * The court, in the exercise of proper discretion, denied this request,"

citing a case in which the question here involved was not involved. Can this Court permit a state court to waive something in its rules which is not there and thus avoid its duty to exercise its appellate jurisdiction? This ques-

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tion was assigned as error in the Supreme court of the state on the ground that such acts on the part of the court violated appellants' rights under the due process and equal protection clauses of the XIVth Amendment.

The State Supreme Court is thus shown to have decided the federal question thus presented, but this Court ignored it.

The question thus decided by the trial court and by division 1 of the Supreme Court, against Mrs. Moffett was the first decision in the case on any question, and preceded the ruling sustaining the demurrers on the ground of misjoinder of parties plaintiff and the dismissal of the case on said ground. This Court has often decided that it is bound by the record before the state court. Under the law as declared by the State of Missouri, through its legislature and Supreme Court, it was bound by the recital that (406):

> "And at the same time, and as a part of the same proceeding and order sustaining said alleged demurrers, said circuit court, without any evidence having been offered to sustain same, and without notice thereof or hearing or jurisdiction so to do, made and entered the following order and judgment in said court and cause:"

The bill of exceptions (410-425) and the record (402-406) sustain said record recital. There was just one way for appellees to get away from that recital in this Court or in the Supreme Court of Missouri, and that was by filing a counter-abstract containing recitals contradicting same. The certified transcript of the record shows that appellees filed a counter-abstract, in which they failed to question said recital. And for said reason the recital became conclusive upon the parties and all the courts, including this,

under the decision of the State Supreme Court in *Eliot* v. *Railroad,* 204 Mo. 1, l. c. 12-13:

> "Plaintiff, in filing an additional abstract to supply matters omitted in defendant's abstract, must be considered as having waived any other objection to it than as indicated in the additional abstract; and as the abstract shows that the bill of exceptions was duly filed and also states what the record shows, it is conclusive, in the absence of a counter-abstract showing to the contrary. (*Lumber Company* v. *Knights of Pythias, supra; Martin* v. *Castle,* 182 Mo. 216.)"

Could this Court properly leapfrog this federal question?

Weighted down, as it was and is, with the law and the authorities to the contrary, it was and is a physical and legal impossibility so to do.

Such impossibility is well illustrated by Mark Twain's report of the case of "The Celebrated Jumping Frog of Calaveras County," as detailed in Jessup's Edition of The World's Best Books, page 102, l. c. 106-107.

VII.

The decision of the state court sought to be reviewed was not based on a nonfederal ground adequate to support it, because:

1st. The Civil Rights Acts provided an exclusive remedy and authorized Mrs. Moffett to sue in both capacities.

2nd. A demurrer on the ground of misjoinder of parties plaintiff was not allowed by the state law.

It is unnecessary to discuss the 1st reason referred to in the above heading, because it has been amply discussed heretofore.

The 2nd ground, to-wit: that the state statute did not allow a demurrer for misjoinder of parties plaintiff is settled by the statute itself (Section 922, R. S. Mo. 1939), plus its construction by this Court in *Magwire* v. *Tyler*, 17 Wall. 253, l. c. 286, and later followed by the Missouri Supreme court.

The ground upon which the judgment of the Supreme Court of Missouri is based was that there is a misjoinder of parties plaintiff—a ground of demurrer not allowed by the Missouri statute.

In *Magwire* v. *Tyler*, 17 Wall. 253, l. c. 286, this Court so decided. The Missouri demurrer statute was in the same language from its enactment in 1855 to December 30, 1944. Section 922, R. S. Mo. 1939, was the only statute authorizing demurrers on December 30, 1944. The opinion in the Magwire case, l. c. 286, embodies said statute and construes it, thus:

> "By the same statute it is enacted that the defendant may demur to the petition when it shall appear upon the face thereof, either (1) that the court has no jurisdiction of the person of the defendant or the subject matter of the action; (2) that the plaintiff has not legal capacity to sue; (3) that there is another action pending between the same parties for the same cause of action in the state; (4) that there is a defect of parties plaintiff or defendant; (5) that several causes of action have been improperly united; (6) that the petition does not state facts sufficient to constitute a cause of action; (7) that a party, plaintiff or defendant, is not a necessary party to a complete determination of the action. 2 Rev. Stat. 1231.
>
> *No other grounds of demurrer are allowed by the statutory rules of pleading.*" (Italics ours.)

Said construction of the demurrer statute by this Court was necessitated by a judgment of the Supreme Court of Missouri in *Magwire* v. *Tyler*, 47 Mo. 115 (by the same judge who decided *Cummings* v. *Missouri*, 4 Wall. 277), disobeying a mandate of this Court by holding that this Court was without jurisdiction to decide whether the decision was based on a nonfederal ground adequate to sustain it, even though rights under an Act of Congress were involved.

There the state court found that the pleadings made the case a suit in equity and that the opinion and mandate of this Court operated to make it a suit at law and that consequently the state court was bound by the state law rather than the federal and was without power or jurisdiction under the state law to give effect to the judgment of this Court or to the Act of Congress there involved. In principle its act was on all fours with the contention of appellees on which this Court has dismissed this appeal. It undertook to decide what questions could be decided by this Court. Thus (47 Mo. l. c. 125-126):

> "The only question which it was competent for the Supreme Court of the United States to notice when the cause was removed there was the question of title arising out of the respective confirmations under which the parties claimed.
>
> Everything else set up in the bill and answer was peculiarly and exclusively of local state jurisdiction, over which the national tribunal had no control, and concerning which an adjudication here is final."

The opinion expressly held that the jurisdiction of this Court was restricted to questions arising under the laws of the United States: that regardless of the way the state law was involved with the federal law this Court could not

consider any question arising under the state law, and then dismissed the case instead of obeying the mandate.

On appeal from the judgment of dismissal the counsel for plaintiff in error finished his brief (see 21 Law Ed. of the report in *Magwire* v. *Tyler*) thus, l. c. 579:

> "In conclusion, we are perfectly satisfied that no reliance can be placed in the Supreme Court of Missouri to concede to our client any right in the property in dispute, in law or equity."

Evidently this Court accepted said statement as correct and reversed the judgment of dismissal and itself rendered the appropriate judgment and awarded execution, saying, l. c. 585 (84 U. S. 290):

> "• • • it seems to be quite clear that it would be useless to remand the cause a second time, as the court has virtually decided that they cannot, in their view of the law, carry into effect the directions of this court as given in the mandate."

The decision of the State Supreme Court necessitated a full examination of the Missouri code of civil procedure by this Court so as to enable it to determine whether or not the State Supreme Court had jurisdiction to comply with the mandate. This made it necessary to construe the code —insofar as it prescribed rules of pleading and prescribed how rights could be waived. This Court then decided that the parties interested had waived all right to question the jurisdiction by failure to raise such questions by demurrer or answer under the statutes.

It thus appears that it was necessary for this Court to determine what grounds of demurrer were allowed, and it decided that, l. c. 286:

"No other grounds of demurrer are allowed by the statutory rules of pleading" (Sec. 992, R. S. Mo. 1939).

It further decided, l. c. 286:

"* * * a demurrer for want of form is not allowed; nor is the jurisdiction of the court in any way affected by forms."

It further pointed out, l. c. 286:

"Such objections as those enumerated in the 6th section (same being the demurrer statute), if they do not appear on the face of the petition, may be taken by answer, * * *"

and if such objections are not taken either way, then they are waived.

It thus appears that said construction of said statute by this Court was necessary, that it was not obiter, and that said construction in the year 1873, as written in said opinion, was written into Section 922, R. S. Mo. 1939, by the seven revisions of the Code in the same language, as much so as if embodied in the statute itself. And under the law as declared by the Supreme Court of Missouri in many cases that court could not amend said Section 922 in this case by incorporating therein the ground of misjoinder of parties plaintiff, for that was the function of the legislature alone. (*Ex Parte Carey*, 306 Mo. 287, l. c. 294).

It thus appears that this Court has itself decided in the Magwire case, that the ground upon which the state court's judgment was rendered was a nonexistent ground. And yet its *per curiam* opinion herein, in direct conflict with said former decision, declares that a nonexistent

ground for a state decision is adequate to support it, and is adequate to justify the denial of appellants' federal rights.

The Supreme Court of Missouri likewise construed said statute, Section 922, R. S. Mo. 1939, in the same way this Court construed it, and held in *Beattie Mfg. Co.* v. *Gerardi*, 166 Mo. 142 (1901), l. c. 153:

> "It will be observed that no such ground of demurrer as that under consideration is authorized by the statute, and as it specifies the grounds upon which the defendant in an action may demur to the petition of his adversary under the well-known rule of the construction of statutes, that the mention of one or more things is exclusive of all others, it would seem that the question could not be raised by demurrer. The Code of New York specifies the grounds upon which a pleading may be demurred to and it was held by the Court of Appeals of that state, in the case of *Marie* v. *Garretson*, 83 N. Y. 14, that no pleading is demurrable unless it is subject to one or more of the objections specified in the provisions of the Code defining the grounds of the demurrer.

And at l. c. 155:

> "Section 598, Revised Statutes 1899, *supra*, specifies the grounds upon which a pleading may be demurred to, and nothing not specified in it can be a ground therefor."

And in *Purdy* v. *Pfaff*, 104 Mo. App. 331 (1904), l. c. 339:

> "Under the code the office of a demurrer is the same as it was at common law, it still is directed to the legal effect of the pleading for defects apparent on the face of the pleading, *but is confined in range to*

the statutory limits. Bliss, Code Pleading, Sec. 404; *Beattie Mfg. Co.* v. *Gerardi,* 166 Mo. 142."

It thus appears that the State Supreme Court and the state statute itself establish that the ground of misjoinder of parties plaintiff was not a ground of demurrer included in the statute. And yet the opinion herein declares that it was based

"upon a nonfederal ground adequate to support it,"

Under the law of the state of Missouri, the construction of said Section 922 by this Court in the year 1873, and the construction of said statute in the above cases, more than 40 years ago, by the Supreme Court of Missouri, expressly declaring that a demurrer could not be entertained to a pleading on a ground not included in the statute—by its readoption as a statute in the seven revisions of the Missouri statutes after the decision of this Court in the year 1873, and the four revisions of said statute after the above decisions by the Missouri appellate courts, operated to include the opinion of this Court construing said statute, and the opinions of the Supreme Court of Missouri as above quoted in said Section 922, as if they were written therein, and deprived the Missouri Supreme Court in this case of power or jurisdiction to decide the case in the state court on said ground, because it was not included in the statute. And the effect of revisions of the statute, as declared by the Supreme Court of Missouri *en banc,* was to deprive the Supreme Court of Missouri in Division 1 of jurisdiction or power to decide the case upon the ground of misjoinder of parties plaintiff, since said ground was not included in Section 922, R. S. Mo. 1939, and to make that a question which could be determined

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only by the legislature of Missouri by the enactment of a law including the ground of misjoinder of parties plaintiff as a ground of demurrer in that state.

Ex Parte Carey, 306 Mo. 287, l. c. 294.
Sanders v. *St. Louis & N. O. Anchor Line,* 97 Mo. 26, l. c. 30-31.
Kansas City Public Service Co. v. *Ranson,* 328 Mo. 524, l. c. 536.
Sutherland on Statutory Construction, 2d Ed., Sec. 403.
Georgia Railway & Electric Co. v. *City of Decatur,* 295 U. S. 165, l. c. 170.

The Missouri demurrer statute never did include the ground of misjoinder of parties.

All the text writers, and all the courts which have passed on the question presented by this motion for rehearing, in every state where the Code of Civil Procedure is adopted, have expressly decided that misjoinder of parties plaintiff is not a ground of demurrer in any state having such statute.

See:

Mader et al. v. *Plano Mfg. Co.,* 17 S. D. 553, 556, 97 N. W. 843.
Kyle v. *Craig,* 125 Cal. 107, l. c. 111, citing *Hentsch* v. *Porter,* 10 Cal., l. c. 558.
Applying the New York rule in *Caldwell* v. *Ruddy,* 1 P. 339 (Ida.) 340.
Reed v. *Higgins, Adm.,* 86 Ind. 143, 145.
Mayberry v. *Kelly,* 1 Kan. 116, l. c. 123.
Phoenix Bank v. *Donnell,* 40 N. Y. 410, l. c. 412-413.
Rusczck v. *Chicago, & N. W. Ry. Co.,* 210 N. W. 316.
Kucera v. *Kucera and Wife,* 86 Wis. 416.
Hanna v. *Brictson Mfg. Co.,* 62 F. (2d) 139, l. c. 144.

Aaron v. *Security Inv. Co.*, 211 N. W. 965, l. c. 967.
Virginia Hot Springs Co. v. *Hoover*, 130 S. E. 408, l. c. 409.
Gilbert v. *Glenn*, 156 S. E. 325, l. c. 333.
State ex rel. Kratche v. *Civil Court of Milwaukee County*, 191 N. W. 507, l. c. 508.
Wunderlich et al. v. *Chicago & N. W. Ry. Co.*, 66 N. W. 1144, l. c. 1145.
Dunn v. *Barnes, Adm'r*, 73 N. C. 273.
Smith et al. v. *Summerfield et al.*, 12 S. E. 997.
Ulness v. *Donnell et al.*, 237 N. W. 208 (N. D.).
Commercial & Savings Bank v. *Erdman*, 208 N W. 582, l. c. 583-584.
Hotchkiss v. *Ogle*, 153 Kan. 156, l. c. 162.
Parker v. *Simpson*, 180 Mass. 334, Syl. 2 and 9.

In Pomeroy's Code Remedies, Fifth Edition, page 214, note 89, discussing the identical Code provision, is the following, citing Missouri authority:

"'A misjoinder or uniting of parties who should not be joined cannot be taken advantage of by demurrer.' *Dolan* v. *Hubinger*, 109 Iowa, 408, 80 N. W. 514; *Cedar Rapids Nat. Bank* v. *Lavery*, 110 Iowa 575, 81 N. W. 775; *O'Neill* v. *Cunningham*, (Okla.) 244 Pac. 444; *Hot Springs Co.* v. *Hoover*, (Va.) 130 S. E. 408; *Dieterle* v. *Harris*, 66 Okla. 314, 169 Pac. 873; *Schmidt* v. *Wallinger*, 125 Va. 361, 99 S. E. 680; *Frankel* v. *Garrard*, 160 Ind. 209, 66 N. E. 687; *Commercial & Savings Bank* v. *Erdman*, 50 S. D. 97, 208 N. W. 582; *Mauldin* v. *Milford*, 127 S. C. 508, 121 S. E. 547; *Robinson* v. *Nelson*, 44 S. D. 281, 183 N. W. 874; *Canfield* v. *Newman*, (Tex. Civ. App.) 265 S. W. 1052; *Russell First Nat. Bank* v. *Knoll*, 7 Kan. App. 352, 52 Pac. 619; *Akins* v. *Hicks*, 109 Mo. App. 95, 83 S. W. 75; *Lancaster County* v. *State*, 74 Neb. 211, 104 N. W. 187, 107 N. W. 388; *Mader* v. *Plano Mfg. Co.*, 17 S. D. 553, 97 N. W. 843. A motion is the proper remedy. *Lull* v. *Anamosa Nat. Bank*, 110 Iowa 537, 81 N. W. 784; *Martin V. Clay*, 8 Okla., 46, 56

Pac. 715; *Hornish* v. *Ringen Stove Co.*, 116 Iowa 1, 89 N. W. 95; *Stiles* v. *City of Guthrie*, 3 Okla. 26, 41 Pac. 383; *Powell* v. *Banks*, 146 Mo. 620, 48 S. W. 664 (even after judgment)."

In every case in which a federal right was involved in the federal courts, those courts, construing and applying the Missouri Code of Civil Procedure, have held that misjoinder of parties plaintiff was not a ground for demurrer.

Magwire v. *Tyler*, 17 Wall. 253.
Armour v. *Roberts*, 151 Fed. 846.
Miller v. *Union Pacific R. R.*, 290 U. S. 227.
Hendon v. *Kurn*, 351 Mo. 980.
Butler v. *Lawson*, 72 Mo. 227.

Conclusion.

In *Baltimore & Ohio R. Co.* v. *Kepner*, 314 U. S. 44, at l. c. 52, it is said:

> "It is clear that the allowance or denial of this federal privilege is a matter of federal law, not a matter of state law under *Erie Railroad Co.* v. *Tompkins*, 304 U. S. 64, 72. Its correct decision depends upon a construction of a federal act. Consequently, the action of a state court must be in accord with the federal statute and the federal rule as to its application, rather than state statute, rule or policy."

Since this case involves the Federal Civil Rights Acts, and their construction and application (Sections 43, 47 and 48, Title 8), as to whether or not they provide a single remedy for the loss caused by the same wrongful acts to the same person in every capacity in which injury or deprivation was sustained, the question involved is necessarily a federal question under the rule stated in *Cohens* v. *Virginia*, 6 Wheat., l. c. 379, when it said:

> "A case in law or equity consists of the right of the one party, as well as of the other, and may truly be said to arise under the Constitution or a law of the United States, whenever its correct decision depends upon the construction of either."

In the same case, at l. c. 404, it is said:

> "It is most true that this court will not take jurisdiction if it should not; but it is equally true that it must take jurisdiction if it should. The judiciary cannot, as the legislature may, avoid a measure because it approaches the confines of the Constitution. We cannot pass it by because it is doubtful. With whatever doubts, with whatever difficulties, a case may be attended, we must decide it if it be brought before us. We have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given. The one or the other would be treason to the Constitution. Questions may occur which we would gladly avoid, but we cannot avoid them. All we can do is to exercise our best judgment, and conscientiously to perform our duty. In doing this, on the present occasion, we find this tribunal invested with appellate jurisdiction in all cases arising under the Constitution and laws of the United States. We find no exception to this grant, and we cannot insert one."

The reason given for sustaining the motion to dismiss, in the light of the foregoing, is manifestly invalid, for this is a case which cannot be governed by the rules applied in the two cases cited by this Court in its per curiam opinion.

Neither of said cases was based upon any federal law. The right asserted was based upon the laws of the states mentioned in said opinions. In neither of said cases was any question involved concerning the question as to whether or not the same person could recover under a

federal law or the Civil Rights Acts for violation of the constitutional rights mentioned.

These circumstances make the second sentence of Clause 2, Section 2 of Article 3 of the Constitution operative in this case, for it appears that this is a case to which the judicial power extends, and it is not a case of original jurisdiction but one governed by the mandatory provision:

> "In all the other cases before mentioned, the Supreme Court shall have appellate jurisdiction, both as to law and fact, with such exceptions, and under such regulations as the Congress shall make."

Section 237 of the Judicial Code discloses that Congress has made no exceptions or regulations excluding the appellate jurisdiction of this Court over this case. As to this case, the law, as declared by this Court in *Cohens* v. *Virginia,* was still the applicable law until October 14, 1946, on which date the decision of this Court dismissing the appeal herein either overruled or ignored the decision in *Cohens* v. *Virginia,* 6 Wheat. 264.

But we respectfully submit that it is not yet too late to correct this error, so that the ancient landmark fixed by said decision may not be obliterated.

We respectfully submit that this Court is without power or jurisdiction if *Cohens* v. *Virginia* be not overruled to decline jurisdiction in this case, and so appellants' motion for rehearing should be sustained, the record ordered printed, and the cause set down for argument; and, after a hearing thereof, the judgment of the Supreme Court of Missouri should be reversed.

Respectfully submitted,

A. E. Watson,
Martin J. O'Donnell,
Attorneys for Appellants.

Exhibit "A."

IN THE CIRCUIT COURT OF THE UNITED STATES
FOR THE EASTERN DISTRICT OF TEXAS
AT SHERMAN

SALLIE C. WULF

vs. C. L. No. 111

MISSOURI, KANSAS & TEXAS RAILWAY COMPANY

On this the 10th day of January, 1911, this cause coming on to be tried, all parties appeared in person and by attorney and announced ready for trial; whereupon came a good and lawful jury, to-wit: Tom E. Davis, Foreman, and eleven others, who were duly empaneled and sworn and who, after hearing the evidence, the argument of counsel and the charge of the court, retired to consider of their verdict; and after due deliberation returned into open court the following verdict, to-wit:

January 10, 1911.

TO THE HONORABLE CIRCUIT COURT FOR THE EASTERN DISTRICT OF TEXAS:

"We, the jury, in the case of Sallie C. Wulf against the M. K. & T. Railway Company find for Sallie C. Wulf, the plaintiff, a verdict for $7,000.00 cash money.

TOM E. DAVIS, Foreman."

It is therefore considered by the court and so ordered, adjudged and decreed that the plaintiff, Sallie C. Wulf, in her individual capacity and as administratrix of the estate of Fred S. Wulf, deceased, do have and recover of the defendant, the Missouri, Kansas and Texas Railway Company, a corporation, the sum of seven thousand ($7,000.00) dollars, together with interest thereon at the rate of 6 per cent per annum from this date, and all costs of suit

for which let execution issue. The amount recovered herein shall be for the sole use and benefit of said Sallie C. Wulf, and the payment to her of said seven thousand dollars, together with interest and costs as aforesaid, shall be a complete liquidation and settlement of said entire cause of action and shall acquit the defendant from further liability thereon.

(s) GORDON RUSSELL,
Judge

United States of America
Eastern District of Texas } ss:

I, Ruth B. Head, Clerk of the United States District Court in and for the Eastern District of Texas, do hereby certify that the annexed and foregoing is a true and full copy of the original JUDGMENT rendered in THE CIRCUIT COURT OF THE UNITED STATES, FOR THE EASTERN DISTRICT OF TEXAS, AT SHERMAN, in the case of

SALLIE C. WULF

vs. C. L. No. 111

MISSOURI, KANSAS & TEXAS RAILWAY COMPANY

now remaining among the records of the said Court in my office.

IN TESTIMONY WHEREOF, I have hereunto subscribed my name and affixed the seal of the aforesaid Court at Sherman, Texas this 26th day of October, A. D. 1946.

(SEAL)

Ruth B. Head, RUTH B. HEAD,
Clerk.

UNITED STATES DISTRICT COURT

Eastern District of Texas

SALLIE C. WULF

vs.

MISSOURI, KANSAS & TEXAS RY. CO.

CERTIFIED COPY

JUDGMENT

BLEED THROUGH- POOR COPY

No. 318. MOFFETT ET AL. *v.* COMMERCE TRUST CO. ET AL. Appeal from the Supreme Court of Missouri. October 14, 1946. *Per Curiam:* The motion to dismiss is granted, and the appeal is dismissed for the reason that the decision of the state court sought here to be reviewed was based upon a non-federal ground adequate to support it. *Enterprise Irrigation District* v. *Farmers Canal Co.*, 243 U. S. 157, 165; *Utley* v. *St. Petersburg*, 292 U. S. 106, 111. *Martin J. O'Donnell* for appellants. *Charles M. Blackmar, John T. Harding, R. C. Tucker, Walter A. Raymond* and *B. C. Howard* for appellees. Reported below: 354 Mo. 1098, 193 S. W. 2d 588.